APPENDIX

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1969

No. 642

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California,
*Petitioner,*

vs.

VERON ATCHLEY,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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**DOCKET ENTRIES**

United States Court of Appeals
for the Ninth Circuit

D. C. No. 46688
D. C. Judge Robert H. Peckham
Notice of
appeal filed Feb. 20, 1968
412 Fed. Rep. 2nd. p. 230
H. C. Northern District of California

| | |
|---|---|
| Lawrence E. Wilson, Warden<br>vs.<br>Veron Atchley | 22735 |

*For Appellant:*
Thomas C. Lynch, Atty Gen.

*For Appellee:*
Clinton Coddington, Esq.
Bronson, Bronson & McKinnon

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES APPELLANT |
|---|---|---|
| 1968 | | |
| Apr. 2 | Filed March 12, 1968, certified typed transc of record & docketed case & entered appearance of counsel | $25.00 |
| May 14 | Filed 2 add'l copies of record: Clerk's Fee: 93 pp. | 5.00 |
| May 19 | Filed 20 Appellant's Briefs | |
| July 23 | Filed motion & order (C)ext time to file appellee's brief to Sept. 3, 1968 | |
| Sept. 4 | Filed motion & order (C)ext time to file appellee's brief to Oct. 3 | |
| Sept. 11 | Loaned to Clinton Coddington copy of record. | |
| Sept. 12 | Recvd. notice of assoc. of Messrs. Green & Crowley for Petr.-Appellee | |
| Sept. 25 | Copy of entire record returned by Coddington | |
| Oct. 3 | Recd. large box from Bronson, Brown, McKinnen containing State Court transcript (Room 221) | |
| Oct. 3 | Filed appellee's briefs | |
| Oct. 17 | Filed motion & order (C)ext time to file applt reply brief to Nov. 15 | |
| Nov. 15 | Filed Appellant's Reply Brief | Calendar 2 |

| DATE | FILINGS—PROCEEDINGS | CLERK'S FEES APPELLANT |
|---|---|---|
| 1969 | | |
| Feb. 10 | Cause arg. & ord. sub. (BA H BR) | |
| May 27 | Ordered per curiam opinion filed—Barnes, C.J. dissenting and judgment filed & ent. | |
| " 27 | Filed opinion. Judg. of DC Affirmed | |
| " 27 | Filed & ent. judgment | |
| June 10 | Filed 25 of applts petition for rehearing & suggestion for rehearing en banc. | |
| June 26 | Filed order (Ba H Br) denying petition for rehearing & rejecting suggestion for rehearing en banc | |
| Aug. 5 | Issued judgment to Clerk of District Court | |
| Aug. 5 | Returned original record to Clerk, Dist. Ct. | |
| Aug. 7 | Received receipt for | |
| Aug. 27 | Issued certified copy of record to Clk., SC for certiorari | 6.60 |
| Sept. 8 | Recd. receipt therefor (record to SC) | |
| Sept. 29 | Recd. notice from Clk. SC. re: filing pet. for cert. SC#642 | |
| 1970 | | |
| Mar. 4 | Recd. cert. copy of SC order (2-24-70) granting pet. for cert. (to Ba. H. Br) | |

**DOCKET ENTRIES**

United States District Court
Northern District of California

| | |
|---|---|
| Veron Atchley,<br>vs.<br>L. E. Wilson, et al. | 46688 |

Basis of Action: Pet. for writ of H.C.

Attorneys:

*For Plaintiff:*
Pro Per
A 50596 Tamal
Edwin R. Green, Esq. (App.)
&
Jack Crowley, Esq.
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*For Defendant:*
Atty. Genrl. State Calif.
6000 State Bldg., S.F. 2

46688—*Veron Atchley v. L. E. Wilson*

| DATE | | FILINGS—PROCEEDINGS |
|---|---|---|
| 1967 | | |
| Mar. | 10 | 1. Filed order allowing pet. to file in forma pauperis. (Peckham) |
| | | 2. Filed pet. for writ of H.C. |
| | | 3. Filed order to show cause, ret. 28 Mar. 1967. (Peckham)<br>Copies mailed to AG and Pet. |
| Mar. | 21 | 4. Filed order cont. hrg. on O.S.C. to April 21, 1967; ext. time for resp. to file a return to Apr. 7, 1967; petnr. may file a traverse prior to April 21, 1967. (Peckham) |
| Mar. | 24 | Copies mailed to A.G. & Petnr. |
| Apr. | 5 | 5. Filed return by resps. to O.S.C. |
| Apr. | 14 | 6. Filed traverse by Petnr. to return to O.S.C. (File to RFP) |
| Apr. | 21 | Ord., aft. hrg. deft's atty., the O.S.C. submitted. (Peckham) |
| Jun. | 7 | 7. Filed order appointing Edwin W. Green, Esq. and Jack Crowley, Esq., Bronson, Bronson & McKinnon, 255 California St., San Francisco, Calif., 421-7200, as counsel for petnr.; the Clerk is directed to provide Mr. Green with copies of all documents currently in petnr's file. (RFP)<br>Copies mailed to Petnr. A.G. & App'd. counsel. |
| Jun. | 29 | 8. Filed further order to show cause; resp. to file a suppl. return by July 14, 1967 & to lodge all records & transcripts pertaining to the trial court proceedings to be lodged by July 14, 1967; petnr. to file the suppl. traverse to the return by July 28, 1967; Counsel for both parties to file an agreed upon date for the hrg. of this matter. (Peckham)<br>Copies mailed to petnr. & All counsel. |

46688—*Veron Atchley v. L. E. Wilson*

| DATE | | | FILINGS—PROCEEDINGS |
|---|---|---|---|
| 1967 | | | |
| Jul. | 19 | 9. | Filed suppl. return by resp. to O.S.C. (to RFP) |
| Sep. | 11 | | Ord. evidentiary hearing date cont. to Sept. 19, 1967, traverse due Sept. 19, 1967. |
| Sep. | 20 | | Ord., on stip., evidentiary hrg. cont'd. to Sept. 28, 1967 at 2:00 P.M. (Peckham) |
| Sep. | 28 | 10. | Filed supplemental traverse by pltf. in opposition to the supplemented return to Order to Show Cause. |
| Sep. | 28 | | Ord. petition for writ of habeas corpus is hereby submitted to the court for consideration and decision. (Peckham) |
| *1968* | | | |
| Jan. | 22 | 11. | Filed memo. of decision on pet. for habeas corpus. (Peckham) |
| | | | Mailed copies to Petn. and counsel of rcd. |
| Feb. | 20 | 12. | Filed respondents petition for certificate of probable cause. |
| Feb. | 20 | 13. | Filed certificate of probable cause to appeal. (Peckham) |
| Feb. | 20 | 14. | Filed respondents notice of appeal. |
| Feb. | 20 | | Mailed clerks notice of filing appeal. |
| Mar. | 1 | 15. | Filed appellant description of transcript to be included in record and statement of issues. |
| Mar. | 12 | | Made, Mailed Record on Appeal CCA. |

United States District Court
Northern District of California

CASE No. 46688

VERON ATCHLEY, A-50596,
Petitioner,

vs.

LAWRENCE E. WILSON, Warden,
San Quentin State Prison, et al.,
Respondent.

## PETITION FOR WRIT OF HABEAS CORPUS PERSONS IN STATE CUSTODY

*Instructions—Read Carefully*

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall be set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioner should therefore

exercise care to assure that all answers are true and correct.

If the petition is taken in *forma pauperis,* it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, the *original and one copy* shall be mailed to the Clerk of the District Court for the Northern District of California, San Francisco, California.

1. Place of detention: San Quentin State Prison, Tamal, California.
2. Name and location of Court which imposed sentence: Superior Court of the State of California, in and for the County of Butte.
3. The indictment number or numbers (if known) upon which, and, the offense or offenses for which sentence was imposed:
   (a) Criminal Case, 2d Crim. 6450, Trial Court No. unknown.
   (b) Murder, 1st Degree.
   (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:

January 7th, 1959 (sentence) Death, Commutation to Life without possibility of Parole August 22nd, 1961. Commutation to Straight Life December 23, 1966.

5. Check whether a finding of guilty was made:

   (a) after a plea of not guilty: XXXXX

   (b) after a plea of nolo contendere:.....

   (c) after a plea of guilty:.....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

   (a) a jury: XXXXX

   (b) a judge without a jury:.....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

8. If you answered "yes" to (7), list:

   (a) The name of each court to which you appealed:

      I. California State Supreme Court, Section 1239(B) P.C.

      II. Petition for Writ of Certiorari, United States Supreme Court.

   (b) The result in each such court to which you appealed:

      I. Judgment Affirmed.

      II. Certiorari, denied.

   (c) The date of each such result:

      I. Unknown.

      II. May 23, 1960.

   (d) If known, citations of any written opinion or orders entered pursuant to such results:

I. _____

II. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

_____

10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Please see supplement pages as this space is too limited for proper presentation.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Please see supplement pages as this space is too limited for proper presentation.

*Statement of the Case*
*and Answers to Questions 10 and 11-A-B-C.*

Petitioner in this case submits that at the time of his trial and commitment the constitutional law was vague pertaining to the issues herein, the United States Supreme Court clarified the laws and the retroactive application of the laws in *Johnson and Cassidy v. New Jersey,* June 20, 1966.

> "At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for collateral attack are met."
>
> See: *Fay v. Noia,* 372 U.S. 391 (1963).

"Prisoners may invoke a substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous through the years."

See: *Reck v. Pate,* 367 U.S. 433 (1961).

"That test now takes specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance."

See: *Haynes v. Washington,* 373 U.S. 503 (1963);

*Spano v. New York,* 360 U.S. 315 (1959).

"Prisoners are also entitled to present evidence anew on this aspect of the voluntariness of the confession if a full and fair hearing has not already been afforded them."

See: *Townsend v. Sain,* 372 U.S. 293 (1963).

"Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim."

Petitioner submits that counsel during the course of trial and on appeals was unaware that the new doctrines announced by the United States Supreme Court were going to be announced, therefore, counsel was unable to raise the issues as they are presented in this petition.

*Allegation (One) Question 10-A and 11-A*
*Denial of Counsel, Coercion*

Petitioner was arrested at his home at approximately 4:00 a.m. August 3, 1958. He was interrogated all that day and the following day with very little rest. He repeatedly asked for a lawyer, but his requests went unanswered (Rep. Tr. 1502, l. 16-1503, l. 2; id., 1578, l. 21-23; id., 1624, l. 1-2; id., 1629, l. 9). He made no confession of the crime to the officers, despite their repeated questioning on August 3rd and 4th.

Petitioner, incidentally, was raised in the hill country of Tennessee (Rep. Tr. 1411, l. 12-12), finished only the third grade in school (Rep. Tr. 1416, l. 8-20), and could neither read nor write, except to sign his own name (Rep. Tr. 1466, l. 4-5). In all business dealings, even in gaining information from the newspapers, all documents had to be read to him (Rep. Tr. 1410, l. 20, 1411, l. 21).

At about 10:00 a.m. on August 5th, in reply to a call from petitioner, one Ray Travers went to visit him at the jail (Rep. Tr. 997, l. 2-8). Travers had advised him on business matters and just a short time before had written a policy of life insurance for petitioner's wife (Rep. Tr. 2446, l. 18-26). As Travers was leaving he was accosted by one of the officers, who inquired as to whether petitioner had discussed the slaying. Receiving an affirmative answer, the officer sought and received Travers's permission to tape-record a second conversation, and Travers again interviewed petitioner about noon of the same day so

that his statements could be recorded (Rep. Tr. 997, l. 13-21). In the course of the conversation, petitioner made known to Travers that he was trying to get an attorney (Rep. Tr. p. 1009). Petitioner testified at the trial that before this, on some ten occasions, he had told the officers that he wanted an attorney (Rep. Tr. 1502, l. 16-1503, l. 2). Travers gave no indication to petitioner that anything he said might be used in a prosecution against him; instead, assuming a sympathetic mien, he stated in so many words that he had "got to write this all down for the company" (Rep. Tr. 951, l. 5-9). In response to leading questions put by Travers, petitioner made some very damning statements, particularly with regard to the length of time he had been on the premises, the time he secured the gun, and the location where he waited for his wife's return (Rep. Tr. 948-957). It is not surprising that these questions were so subtly and well put, so leading, and so damaging, for it later developed that prior to becoming an insurance agent, Travers had himself been a deputy sheriff for a period of three and a half years, had worked on homicides, had questioned many suspects, and at this particular instance, had used the same method of questioning petitioner as he customarily had done as a police officer interrogating suspects. (Rep. Tr. 1027, l. 22-1028, l. 11; id., 1028, l. 21-1029, l. 3). Repeatedly he made statements to petitioner that he had to secure the information to send in to his company, in order to protect the rights of the beneficiaries, who were the deceased's children (Rep. Tr. 951, l. 5-9; id., 953, l. 4-9).

At the trial not only was the tape-recorded conversation played to the jury (Rep. Tr. p. 1015) and Travers questioned concerning it (Rep. Tr. 997-1001), but it was relied upon heavily by the prosecution to impeach petitioner's testimony in his own behalf (Rep. Tr. pp. 1638, 1642, 1660, 1671, 1678-1682, 1725-1726, 1758).

Petitioner submits that the records support the allegation that he was denied counsel and coerced, the United States Supreme Court ruled on a case similar May 18, 1964, *Massiah v. United States,* 374 U.S. 805, then came the *Escobedo, Jackson v. Denno,* and the *Miranda* decisions, all of which are applicable to the case at bar by virtue of the United States Supreme Court's chronology in *Johnson and Cassidy v. New Jersey,* 384 U.S. 762 June 20, 1966.

Therefore, this case should be reheard and a Writ of Habeas Corpus should issue rendering the Judgment and Commitment null and void ordering petitioner released from custody.

## *II*

### *Question 10-11-B*

### *Denial of Due Process, Violation 6th and 14th Amendment, U.S. Constitution*

Petitioner submits that the United States Constitution, 6th Amendment, clearly states in part, "To have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

In the case before the bar, petitioner submits that the *Commutation of Sentence,* issued by the Executive Department of the State of California, at page one, paragraph three, states:

> "Mr. Atchley's attorney attempted to produce evidence at trial concerning his mental condition. Upon objection by the District Attorney the trial court refused to permit such testimony."

It is relevantly clear that in absence of this testimony in the trial records, the petitioner was denied due process as guaranteed by the 14th Amendment, the right to have a significant issue determined by the trial court. Had the testimony of a witness for defense not been objected to and had the trial court protected the petitioner's constitutional rights, then this petition would be unnecessary. Petitioner is attaching hereto a copy of the *Commutation of Sentence* marked Exhibit (A), said exhibit being conclusive proof of the State's violation of petitioner's 6th and 14th Amendment rights. Petitioner also submits that said exhibit is also conclusive proof of petitioner's mental state during the alleged crime, interrogation and trial.

> I.D. *Mental State.* Where, because of mental defect, desease [sic] or intoxication, a defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought and cannot be guilty of first degree murder. Mck. Dig. Reference #10.

Petitioner's plea of "not guilty" to a first degree murder charge, put in issue the existence of the men-

tal state that are elements of that offense, namely, intent, deliberation, wilfullness, premeditation and malice aforethought.

The introduction of any evidence deserving of consideration that defendant lacked any one of these mental states would have entitled him to an instruction on the effect of this lack. *Mck. Dig. Reference* #179.

The denial of the right to have a significant issue determined by the jury is in itself a miscarriage of justice within the meaning of the 14th Amendment to the United States Constitution, See *People v. Gilbert,* 63 Cal. 2d 690, 47 Cal. Rptr. 909, 408 P. 2d 365.

Had the trial court not violated the petitioner's 6th and 14th Amendment rights then evidence of petitioner's diminished mental capacity, whether caused by intoxication, trauma, or disease (in the instant case, brain damage) could have been used to show that petitioner *did not* have the specific mental state essential to an offense. *Mck. Dig. Reference: Criminal Law* #403, *Cal. Jur. 2d Evidence* #154, *Mck. Dig. Reference: Homicide* #19, #270.

Petitioner submits that the commutation of sentence incorporated herein and marked Exhibit (A) clearly proves that petitioner had a third grade education, could not read or write, and had a brain damage, said damage occurring approximately three years prior to the alleged offense. The commutation also is conclusive proof that at the time of the alleged offense, the petitioner was consumed with jealousy and was of

the opinion that his wife had just spent the evening with another man.

## III

*Question 10-11-C*

***Denial of Due Process; Court's Failure to Hold a Hearing Outside the Presence of the Jury to Determine the Validity of the Coerced Confession. Improper Instructions to the Jury.***

During the course of trial the alleged confession was strenuously objected to as being improper evidence.

The United States Supreme Court ruled in *Jackson v. Denno* (1964), and gave retroactive application to the rule, that: A defendant has a constitutional right under the due process clause of the 14th Amendment to object to a confession being introduced into evidence against him, and upon receiving said objection, the court is constitutionally compelled to afford a defendant a *separate* hearing *outside* the presence of the jury, a hearing to determine the voluntariness and validity of the truth of the interrogators and the confession alike.

During the course of trial in the instant case the alleged confession and the testimony of the interrogator was objected to, the trial court failed to hold a separate hearing, and as an alternative gave erroneous instructions to the jury, instructions that deprived the petitioner of a fair trial inasmuch as the jury was to decide as to the validity of the confession, said de-

cision could only act to deprive the petitioner of his right to trial by a fair and impartial jury. See: Cal. 28 J.I.C.

*Prayer*

Petitioner respectfully prays that this Honorable Court review the record which conclusively proves each and every allegation presented, issue a Writ, making Judgment and Commitment null and void, ordering the petitioner, whom has served eight (8) calendar years, discharged from custody.

Dated: Feb. 1, 1967.

Respectfully submitted,

By: /s/ Veron Atchley

Veron Atchley, Petitioner
P.O. Box A-50596
Tamal, California
In Propria Persona

*Exhibit "A"*

Executive Department — *Commutation of Sentence*
State of California — Veron Atchley

Following the historic policy of California Governors in all extreme penalty cases and under the mandate of our Constitution, I have carefully considered the case of Veron Atchley, who was convicted in Butte County of the crime of murder, first degree, in 1958. My study of this matter included a review of the reports submitted by the District Attorney, the Trial Judge, the Defense Attorney, the Attorney General, the Adult Authority, the report of the psychiatrists who comprise the Neuropsychiatric Examining Committee, and the Opinion of the Supreme Court of California.

The record in this case clearly shows that Veron Atchley murdered his wife Marcella Katherine Atchley after lying in wait, concealed in a back alley. However there are some mitigating factors in this case. This unfortunate killing occurred at a time when Veron Atchley was consumed with jealousy under the belief that his estranged wife had just spent the evening in the company of another man.

Mr. Atchley's attorney attempted to produce evidence at the trial concerning his mental condition. Upon objection by the District Attorney the trial court refused to permit such testimony. The California Supreme Court held that such refusal to permit this medical testimony was erroneous but not prejudicial and did not result in a miscarriage of justice.

Veron Atchley was originally scheduled to be executed on March 25, 1960. He was granted a reprieve until April 15, 1960. On April 29, 1960, I conducted a clemency hearing in this matter. On May 23, 1960, the United States Supreme Court denied his petition, and Veron Atchley was scheduled to be executed on August 23, 1961.

On August 14, 1961, I reviewed the case again. I learned at this time that he was described by the prison psychologist as mentally defective and illiterate, with an I.Q. of 60. I also noted that Veron Atchley had complained of suffering headaches, and of an inability to sleep which followed a blow to the head in 1956. In order to determine if this claim of an injury to the head was truthful and whether it might have some bearing on this case, I ordered that an electroencephalogram test be conducted. I received the results of this test on Friday, August 18, 1961. The test shows that Veron Atchley had definitely suffered serious damage to his brain and to his central nervous system. I was informed by competent medical authorities that this condition could cause him to be more impulsive in situations of emotional stress and to act with less judgment and emotional control than a person with a normal brain under like circumstances. In other words according to the psychiatrists who examined him this crime very likely was the product of a damaged brain reacting to the stress of the emotion of jealousy, and if so, Veron Atchley cannot be held to be totally responsible nor completely accountable for his crime. Let me stress that none of this infor-

mation concerning the injury of Mr. Atchley's brain and central nervous system was available at the time of trial, nor was it known to the Trial Judge, District Attorney or the Defense Attorney. Had this evidence of brain damage which resulted from my investigation been known to the District Attorney, I am certain that he would have recommended that Veron Atchley's life be spared and that he suffer a penalty of life imprisonment.

I am mindful of the considerations of orderly law enforcement, and of even handed justice, and of the great respect which must be accorded to the decisions of our courts and juries. However should I fail to act to spare the life of Veron Atchley under the facts and circumstances of this case, and in light of the evidence of serious damage to his brain and central nervous system which could have produced the violent conduct involved in this case, a great miscarriage of justice might result. I am sure that the strongest advocates of capital punishment would agree with me that it would be inhumane and barbaric to permit a person to suffer the extreme penalty who is not wholly responsible for his acts, and incapable of a complete freedom of choice.

Under all the circumstances of this case, considering the nature of this sad occurrence, the emotional factors above set forth, and the damaged nature of Veron Atchley's brain, I have concluded that the interests of society and justice will best be served by granting to Veron Atchley a commutation of sentence from death to life imprisonment without possibility of parole.

Now, Therefore, In view of the foregoing consideration, I, Edmund G. Brown, Governor of the State of California, pursuant to the authority vested in me by the Constitution and statutes of the State of California, do hereby grant to Veron Atchley, San Quentin No. A-50596, a commutation of sentence from death to life imprisonment without possibility of parole.

In Witness Whereof, I have hereunto set my hand and caused the Great Seal of the State of California to be affirmed this Twenty-second day of August, A.D. Ninteen Hundred and Sixty-one.

/s/ Edmund G. Brown
Governor of California

Attest

/s/ Frank M. Jordan
Secretary of State

---

12. Prior to this petition have you filed with respect to this conviction:

(a) any petition in a State Court for relief from this conviction? Yes.

(b) any petitions in State or Federal Courts for habeas corpus? Yes.

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Only as Specified in (8).

(d) any other petitions, motions, or applications in this or any other court? Yes.

3. If you answered "yes" to any part of (12), list with respect to each petition, motion, or application:

(a) the specific nature thereof:

I. Due to loss of documents, petitioner

II. cannot answer this question correctly.

III. Petition for Writ of Habeas Corpus

(b) the name and location of the court in which each was filed:

I. Due to loss of documents, petitioner

II. cannot answer this question correctly.

III. California State Supreme Court, San Francisco, California.

(c) the disposition thereof:

I. Due to loss of documents, petitioner

II. cannot answer this question correctly.

III. Denied. California State Supreme Court. Crim. No. 10741.

(d) the date of each such disposition:

I. Due to loss of documents, petitioner

II. cannot answer this question correctly.

III. January 18, 1967, California State Supreme Court.

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

I. Due to loss of documents, petitioner

II. cannot answer this question correctly.

III. None known.

14. Has any ground set forth in (10) been previously presented to this or any other court, State or Federal, in any petition, motion, or application which you have filed? Yes.

15. If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

I. All grounds presented as herein to State Supreme Court.

II. Petition Crim. No. 10741 denied January 18, 1967.

(b) the proceedings in which each ground was raised:

I. Habeas Corpus Proceedings, Crim. No.

II. 10741 in the California State Supreme Court. Denied 1-18-67.

16. If any ground set forth in said (10) has not previously been presented to any court, State or Federal, set forth the ground and state concisely the reasons why such ground has not been previously presented:

(a)

(b)

(c)

[Forma Pauperis Affidavit; Affidavit of Verification; Proof of Service by Mail]

Filed March 10, 1967,
James P. Welsh, Clerk.

Thomas C. Lynch, Attorney General
of the State of California
Edward P. O'Brien
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Robert R. Granucci
Deputy Attorney General
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San Francisco, California
Telephone: 557-1959
Attorneys for Respondents

United States District Court
for the Northern District of California

No. 46688

Veron Atchley,
Petitioner,
vs.
Lawrence E. Wilson, Warden, California State Prison, San Quentin, California,
Respondent.

## SUPPLEMENTAL RETURN TO ORDER TO SHOW CAUSE AND POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Come now Louis E. Nelson, Warden of the California State Prison at San Quentin, California, and the People of the State of California, respondents, and for a supplemental return pursuant to the order of this Court, state:

I

Petitioner's allegations respecting the admissibility of his confession do not state grounds for relief on habeas corpus in the light of the records of the state court proceedings because those records establish that petitioner's confession was voluntary.

II

Petitioner's allegations respecting evidence of diminished mental capacity do not state grounds for habeas corpus.

III

Petitioner's allegations respecting the procedures followed by the trial court to determine the voluntariness of petitioner's confession do not state grounds for relief on habeas corpus.

Wherefore, respondents respectfully move that the order to show cause heretofore issued be discharged, the petition denied, and the proceedings dismissed.

Dated: July 19, 1967

Thomas C. Lynch, Attorney General
of the State of California

Edward P. O'Brien
Deputy Attorney General

/s/ Robert R. Granucci
Robert R. Granucci
Deputy Attorney General
Attorneys for Respondents.

## POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

### *Introduction*

Veron Atchley, the petitioner, seeks a writ of habeas corpus to obtain his release from custody pursuant to a 1959 conviction of first degree murder, for which he was originally sentenced to death, which sentence was commuted to life imprisonment without possibility of parole, and subsequently further commuted to allow parole (see petitioner's Exh. "A"). In *People v. Atchley,* 53 Cal.2d 160 (1959), the Supreme Court of California, on petitioner's automatic appeal, affirmed the conviction. Petitioner sought and was granted a writ of certiorari by the United States Supreme Court. Briefs were filed and the matter was orally argued following which the Court, based upon its examination of the record, concluded that the totality of the circumstances did not warrant bringing the case before it, and accordingly, dismissed the writ. *Atchley v. California,* 366 U.S. 207 (1961).

Atchley then applied to this Court for a writ of habeas corpus, which was denied. Petitioner appealed and the denial of the writ was affirmed in *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

In his present application petitioner contends that his confession was improperly admitted into evidence, that the trial court erroneously excluded evidence as to his mental condition and further, that the trial court failed to hold a hearing outside the presence of the jury to determine the admissibility of petitioner's

extrajudicial statement. It is respondents' position that these allegations do not state grounds for relief when viewed in the context of the trial record.

*Facts*

The facts of this case were detailed by the California Supreme Court in *People v. Atchley, supra,* and we quote from the opinion as follows:

> "Defendant was born in 1917 and was reared in a mountainous community in eastern Tennessee. He attended school only through the third grade and cannot read or write anything except his name. Some time between 1943 and 1946 he moved to California and worked in various localities as an agricultural laborer and a welder. He first met the deceased, Marcella Katherine (Farris) Atchley, when he was working near Fresno in 1953. He saw her a number of times before he left the Fresno area, and she bore a child that he claims is his. Defendant eventually entered the used car business in Palermo, California. He bought several lots, built houses on them, and lived in one of the houses with Jewel Spoon, a woman who served as his secretary and bookkeeper. He met the deceased again in 1956 when she came to buy a used car. She returned frequently and after a series of fights with Jewel Spoon moved into defendant's home with five of her children. Jewel retired to a trailer behind the house and later left town. Defendant and the deceased quarreled frequently, but late in 1957 they took a trip and were married in Georgia. They did not publicize their marriage, hoping to avoid a reduction in the aid that she and her children were receiving from the county welfare department.

"During the last few days of July, 1958, Mrs. Atchley and her children moved out of defendant's home to a house in Gridley, California. Although defendant assisted in making the move, a quarrel ensued and Mrs. Atchley complained to the police. Defendant then informed welfare personnel of her marriage to him. She in turn informed the authorities that defendant had been selling used cars without a license.

"On the night of August 2, 1958, Mrs. Atchley went to a dance at Robinson's Corners with her oldest daughter and a young married couple. About 12:15 a.m. she drove her daughter home and then drove the young couple to their home in Oroville.

"Defendant spent that evening drinking beer with several friends, but there is no evidence that he became drunk. Some time after midnight he drove to his wife's house in Gridley and discovered that she was not there. He drove back to Palermo, looking for her at Robinson's Corners and at several taverns along the way. He then returned to Gridley and drove by her house again. Noticing that her car was still absent, he parked his car about a block away and took from a glove compartment a 22-caliber pistol loaded with six or seven bullets. He placed the pistol inside the belt of his trousers and approached the house on foot through a back alley. He then waited in the alley and in the back yard, where he could see the headlights of his wife's car when she drove in.

"About 2:25 a.m. Mrs. Atchley drove up to the carport attached to one side of her house. While she was parking, defendant moved along the op-

posite side of the house and stood by the front corner. Mrs. Atchley walked around to the front gate and up the walk. As she neared the door, defendant stepped out towards her. In the ensuing few minutes she was shot once in the head, once in the left breast, three times under the right arm, and according to the prosecution's experts, once in the back. Her body was later found about 3 feet from the front walk on the side opposite the point where defendant had stepped out. She was lying face down with her feet towards the walk and her head towards the carport.

"Following the shooting defendant drove back to Palermo. He burried the gun in his back yard and hid the holster in an ash can. He then went to bed, where the police found him about 4 a.m.

"At the trial defendant conceded most of the foregoing facts but maintained that he had been told that his wife was going out with another man, that he had taken the gun only to scare them, and that he had no intention of killing or injuring his wife. He stated that when he saw her returning alone, he stepped out to greet her; that his shirttails were tucked in so that the gun inside his belt was clearly visible; that she seized the gun and he struggled to recover it; that the gun went off several times during the struggle; and that after he recovered it, he fired it several more times. The defense introduced much testimony that Mrs. Atchley had said she wished to kill defendant, that she had threatened him with a gun on several occasions, and that she was a violent and combative person.

"Two neighbors testified for the prosecution that they were awakened by the voice of a woman

crying hysterically, 'Oh, don't, don't,' followed by a series of shots. Looking out their bedroom window they saw defendant in a stooping position, shooting towards the ground. Because an intervening fence obscured the body, they assumed that he was shooting at the tires on Mrs. Atchley's car. They and another neighbor, who saw defendant arrive and walk into the back alley, testified that his shirttails were out. Defendant admitted at the trial that the gun inside his belt would not have been visible had his shirttails been out. To rebut defendant's story of a struggle for the gun, the prosecution introduced evidence that all of the shots were fired from such a distance that the deceased could not have been holding the gun at the time, that Mrs. Atchley was found with her keys still clutched in her right hand, and that five empty cartridge casings were found so close to each other as to indicate that the shots had been fired with the gun in approximately the same position. Other evidence indicated that defendant had threatened his wife, that she was afraid of him, and that most of the threats and all of the acts of violence attributed to her occurred during the period of her conflict with Jewel Spoon." 53 Cal.2d at 165-169.

*Argument*

I

*Petitioner's Allegations Respecting the Inadmissibility of His Extrajudicial Statement Do Not State Grounds for Relief on Habeas Corpus*

At his trial and on his appeal petitioner challenged the admissibility of an extrajudicial statement made by him shortly after his arrest to his friend and in-

surance broker Ray J. Travers. The California Supreme Court described the circumstances and content of his statement as follows:

> "The conversation took place in the interrogation room of the county jail two days after defendant had been arrested and before he had obtained a lawyer. Defendant was unaware that his words were being recorded and did not know that Travers had formerly been a police officer or that he had agreed to question defendant so that the recording could be made. In response to Travers' questions defendant admitted arming himself, concealing himself, watching and waiting for his wife, surprising her, and firing several shots while the gun was in his hand. He maintained however, that the shooting occurred during a struggle for the gun and that he had no intention of killing the deceased." 53 Cal.2d at 168-169.

Petitioner now contends that it was a denial of due process to admit the statement because it was taken in violation of the rule enunciated in *Messiah v. United States,* 377 U.S. 201 (1964), and further, because it was involuntary. Petitioner's *Messiah* argument requires little comment. Assuming for purposes of argument the retroactivity of the rule announced in *Messiah v. United States, supra* (a dubious assumption at best in the light of *Johnson v. New Jersey,* 384 U.S. 719 [1966]), the fact remains that *Messiah* is inapplicable to this case because the extrajudicial statement introduced into evidence was not the product of a post-indictment (or information) process of interrogation.

Petitioner's contention that his extrajudicial statement was involuntary is likewise without merit. The Supreme Court of California, well aware of the rule requiring a showing of voluntariness prior to the admission of an extrajudicial statement carefully reviewed the record and found "substantial and uncontradicted evidence that no coercion occurred." 53 Cal.2d at 171. This finding is clearly supported by the record which shows that in an earlier unrecorded conversation petitioner had volunteered substantially the same statements to Travers that he made in the later tape recorded conversation.

Title 28, United States Code section 2254(d) provides that a determination after a hearing on the merits of a factual issue made by a state court of competent jurisdiction [in a] proceeding to which the applicant and the state were parties, evidence by a written finding or opinion shall be presumed to be correct where the petitioner had a fair opportunity to litigate the matter and where the determination of the state court is fairly supported by the evidence. In the present case, the record of petitioner's trial, as well as the opinion of the Supreme Court of California, set out the circumstances under which petitioner's statement was made, from which it may fairly be concluded that such statement was voluntary. Thus we respectfully submit that this Court should, pursuant to the mandate of Title 28, United States Code section 2254(d), accept the determination by the California courts on the issue of voluntariness.

## II

### *Petitioner's Allegations Respecting His Diminished Mental Capacity Do Not State Grounds for Relief on Federal Habeas Corpus*

Petitioner's next contention is that the trial court erroneously excluded evidence bearing on his mental condition at the time of the shooting and thus deprived him of due process of law. This allegation does not state grounds for relief on federal habeas corpus because the admissibility of evidence respecting diminished mental capacity to lower the degree of the criminal homicide is a matter of state law, not federal law. See *Leland v. Oregon*, 343 U.S. 790 (1952). Allegations which concern nothing more than errors of state law are insufficient to warrant the issuance of a writ of habeas corpus. *Nolen v. Wilson*, .....F.2d ____ (No. 20984, 9th Cir. Feb. 1, 1967); see also *Beck v. Washington*, 369 U.S. 541, 554 (1962). In any event, the Supreme Court of California considered the specification of error in the light of the record as a whole and found that no prejudice to petitioner resulted therefrom. See *People v. Atchley, supra*, 53 Cal.2d at 176-177.

## III

### *Petitioner's Allegations Respecting the Procedure Used by the Trial Court to Determine the Admissibility of His Extrajudicial Statement Does Not State Grounds for Relief on Habeas Corpus*

Petitioner's final contention is that the trial court failed to hold a hearing outside the presence of the jury to determine the voluntariness of his extrajudicial statement. Petitioner relies on *Jackson v. Denno*, 378 U.S. 368 (1964). There were several answers to petitioner's contention. First, in *Sims v. Georgia*, 17 L.Ed.2d 593, 598 (1967), the Supreme Court clearly intimated that *Jackson v. Denno* is not to be applied retroactively. Secondly, the record in the present case shows that the trial court, before allowing petitioner's statement to be admitted into evidence, held a lengthy hearing out of the presence of the jury in which it listened to the tape recording of petitioner's statement and then heard arguments of counsel respecting its admissibility. Only after that extended hearing was the prosecution permitted to allow witness Travers to testify before the jury as to his conversations with the petitioner. Thirdly, as noted by the Supreme Court of California, the evidence that petitioner's statement was voluntary was uncontradicted. See *People v. Atchley, supra*, 53 Cal. 2d at 171.

*Conclusion*

We respectfully submit that the order to show cause heretofore issued should be discharged, the petition denied, and the proceedings dismissed.

Dated: July 19, 1967

Thomas C. Lynch, Attorney General
of the State of California

Edward P. O'Brien
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/s/ Robert R. Granucci
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[Statement of Service by Mail]

Filed July 19, 1967,
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United States District Court
for the Northern District of California

No. 46,688

Veron Atchley,
*Petitioner,*

vs.

Lawrence E. Wilson, Warden,
California State Prison,
San Quentin, California,
*Respondent.*

## SUPPLEMENTAL TRAVERSE IN OPPOSITION TO THE SUPPLEMENTAL RETURN TO ORDER TO SHOW CAUSE

### I. *Preliminary Statement*

Petitioner, Veron Atchley, was convicted of first degree murder on January 7, 1959. He was sentenced to death. The death sentence was commuted to life imprisonment, in 1961.

This habeas corpus proceeding is brought on the ground that petitioner was denied his constitutional guarantees during the trial.

## II. *Facts of the Case*

Petitioner was arrested at 4:00 a.m. on August 3, 1958. (R.T. Vol. VI, p. 1578). His interrogation began at approximately 6:00 a.m. of the same day and continued through August 5. He had not slept on August 2, and obtained very little rest during the period of interrogation. (R.T. Vol. VI, p. 1501). Petitioner repeatedly asked for a lawyer but did not receive one until well after his confession to Roy Travers (R.T. Vol. [VI] p. 1502).

On August 5, Mr. Travers, a former deputy sheriff in Nevada, was asked by the police to interrogate the petitioner. (R.T. Vol. IV, pp. 997-1019-1027). Travers was a friend of petitioner and had previously sold an insurance policy on the life of his wife. Travers was given access to the petitioner; and, under the guise of needing to know the facts surrounding the death of the petitioner's wife in order to obtain payment of the policy of insurance to the petitioner's children, was able to [elicit] a confession. (R.T. Vol. IV, pp. 997-1027). The conversation was tape recorded by the police without the knowledge of the petitioner (R.T. Vol. IV, pp. 938-1035) and it was later played back at the trial.

The trial judge listened to the tape recording in chambers after the defense objected to its introduction into evidence. All evidence concerning its vol-

untariness was heard in front of the jury, however. The tape recording was admitted into evidence. (R.T. Vol. IV, pp. 938-1035). The petitioner was illiterate with an I.Q. of 60, and in addition, had previously suffered damage to his brain and central nervous system. His education was limited to the third grade and he could neither read nor write. (Exhibit "A" to petition for writ of habeas corpus; R.T. Vol. V, p. 1416).

## III. *Argument*

Petitioner raises two constitutional issues:

1. Did the failure of the trial judge to hear the evidence on the voluntariness of the petitioner's confession outside of the hearing of the jury deprive the petitioner of the rights guaranteed him by the Fourteenth Amendment of the United States Constitution?

2. Was the confession involuntary, and, therefore, its introduction into evidence in violation of the Fourteenth Amendment to the United States Constitution?

### A. *The Trial Court's procedure for determining the voluntariness of the petitioner's confession failed to satisfy federal constitutional standards.*

As seen from the trial transcript, the trial judge listened to the tape recording in chambers. At that time the petitioner's attorney made an appropriate objection as to the voluntariness of the confession. The court delayed ruling and reconvened the jury. At that time a witness, Ray Travers, testified, and the State attempted to lay a foundation for the voluntariness of the confession. After Mr. Travers had been

examined and cross-examined, in front of the jury, the court allowed the tape recording containing the confession to be played.

Petitioner contends that this procedure was in violation of the Fourteenth Amendment of the United States Constitution.

The applicable Supreme Court case on this issue is *Jackson v. Denno,* 378 U.S. 368, 12 L.Ed.2d 908. This case held that the Due Process clause of the Fourteenth Amendment guarantees the defendant in a criminal action a fair hearing and a reliable determination on the issue of voluntariness by the trial judge *before* the confession is admitted into evidence. That is, a defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined. As the trial transcript clearly shows, the trial judge did not make the required determination out of the presence of the jury. Rather, the defendant's attorney made his formal objections in chambers and the state was allowed to place Travers upon the stand in order to show that the confession was voluntary. The state then proceeded to question this witness in front of the jury. Only after the direct and the subsequent cross-examination did the trial judge allow the confession to be admitted into evidence.

This procedure is clearly in violation of the Fourteenth Amendment (*Jackson v. Denno,* supra.)

The purpose of the *Jackson* rule is to prevent the jury from hearing an involuntary confession. This is

because confessions are so likely to be highly persuasive. The same can be said of a jury knowing that a defendant has confessed even it the confession itself is excluded. This is the situation presented by the procedure used at the petitioner's trial. Even if the trial judge had determined that the confession was involuntary, *after* listening to Travers, the jury still would have heard that Atchley had in fact confessed. (*Sims v. Georgia,* 17 L.Ed.2d 593).

The State, in its Supplemental Return to the Order to Show Cause, further contends however, that the rule enunciated in the *Jackson* case is not retroactive. This contention is without merit. The court is referred to *Johnson v. New Jersey,* 384 U.S. 719, wherein it is stated:

> "[In] . . . Jackson v. Denno . . . we concluded that retroactive application was justified because the rule affected the very integrity of the fact finding process and averted the clear danger of convicting the innocent . . ."
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> * * * * * * * * * *
>
> "We gave retroactive effect to Jackson v. Denno, supra, because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature."

In *Linkletter v. Walker,* 381 U.S. 618, the Court stated that:

> "Finally, in each of the three areas in which we have applied our rule retrospectively (2) . . .

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"2 . . . In Jackson v. Denno, Supra, the holding went to the basis of fair hearing and trial be-

cause the procedural apparatus never assured the defendant a fair determination of voluntariness."

Therefore, there is no question but that the United States Supreme Court has determined that the rule of *Jackson v. Denno* is to be applied retroactively.

It is therefore respectfully prayed that this Court determine that the trial court failed to adhere to the rule of *Jackson v. Denno,* and, therefore, violated the due process clause of the Fourteenth Amendment of the United States Constitution.

B. *The confession extracted from the defendant in this instance was involuntary and consequently in violation of the Fourteenth Amendment of the United States Constitution.*

It is well settled that it is a violation of the Due Process clause of the Fourteenth Amendment to the United States Constitution to admit an involuntary confession into evidence. *Jackson v. Denno,* 378 U.S. 368, 12 L.Ed.2d 908; *Blackburn v. Alabama,* 361 U.S. 199, 4 L.Ed.2d 242. The Supreme Court has repeatedly held these confessions are inadmissible not only because of the problem of reliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly felt attitude of our society that important human values are sacrificed when an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will, and because of the deep-rooted feeling that the police must obey the law while enforcing the law, that in the end life and liberty can be as much

endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. *Spano v. New York,* 360 U.S. 315; 3 L.Ed.2d 1265; *Blackburn v. Alabama,* supra.

The question whether a confession was coerced depends upon whether the defendant's will was overborne at the time he confessed; for if such was the case, his confession cannot be deemed the product of a rational intellect and a free will. *Reck v. Pate,* 367 U.S. 433, 6 L.Ed.2d 948. It is also settled that physical mistreatment is but one circumstance to be considered in determining whether the confession was involuntary. Other circumstances may combine to produce an effect just as impelling coercive as the deliberate use of the third degree. *Reck v. Pate,* supra. It is conceded that each case must stand on its own two feet. The following cases present fact situations similar to the case at bar in which the Supreme Court has held that the confession was involuntary:

1. In *Haynes v. Washington,* 373 U.S. 503, 10 L.Ed.2d 513, the confession was made and signed 16 hours after the arrest, during which time the defendant was refused permission to call his wife or an attorney, and was repeatedly told that he was not to be allowed to call unless and until he cooperated with the police and gave them a written and signed confession.

2. In *Reck v. Pate,* 6 L.Ed.2d 948, a 19 year old youth of subnormal intelligence and without previous experience with the police was held incommunicado for four days preceding his first confession, during which time he was subjected daily to six or seven hour stretches of relentless

and incessant interrogation, and was intermittently placed on public exhibition in police showups, while during the entire period he was physically weakened and under intense pain, without adequate food, without counsel, and without the assistance of family and friends.

3. In *Spano v. New York,* 360 U.S. 315, 3 L.Ed.2d 1265, the defendant was subjected to prolonged interrogation by numerous law enforcement officers beginning in the early evening and continuing into the night and the following morning. Defendant's requests to see his attorney were denied. His will not to answer the questions of the police, was overborne by official pressure, fatigue and sympathy falsely aroused. In the latter respect the record disclosed that a police officer, a close friend of defendant, whom defendant had first contacted by telephone, was instructed by his superiors to state that because of his telephone call his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child.

4. In *Payne v. Arkansas,* 356 U.S. 560, 2 L.Ed.2d 975, the defendant was arrested and detained incommunicado in a cell for approximately two days. There was no charge made against him during this period. His repeated request to make phone calls were denied. He also missed several meals during this period. The local police chief informed the defendant on the second day of his incarceration that there were about 30 or 40 people outside of the jail that wanted to "get to him." The chief then told him that if he would confess, he would prevent the people from attacking him. There was no one outside of the jail at the time.

Mr. Atchley's case is strikingly similar to the cited cases:

a. He was illiterate with an I.Q. of 60, and could neither read nor write.

b. He had previously suffered damage to his brain and central nervous system.

c. He was held incommunicado and subjected to prolonged interrogation over a period of 2 days.

d. He had not slept during the day previous to his arrest, and obtained very little rest during the period of his interrogation.

e. His repeated requests for an attorney were all denied.

f. He was not informed of his right to counsel, his right to remain silent, or the fact that any statement that he made could be used in evidence against him.

g. The fact that Travers was an agent of the police was not disclosed to him.

h. He was not informed that his conversation was being tape-recorded.

i. He was deceived into thinking that the information that he disclosed was necessary in order that his children would receive the benefits from the life insurance policy.

A confession is not voluntary if it is obtained by any direct or implied promises, however slight, or of any exertion of improper influence. (*Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed.2d 653; *Lynumn v. Illinois,* 372 U.S. 528 9 L.Ed.2d 922). The confession is similarly inadmissible if it is the product of psychological pres-

sure, (*Townsend v. Sain*, 372 U.S. 293, 9 L.Ed.2d 770). Other factors bearing on the voluntariness of a confession are the suspect's mental powers, the state of his health, his previous experience with police, the length of his detention, the duration of his interrogation, whether the accused had the advice of a lawyer, friends or relatives and whether he was advised of his rights, such as whether or not he was told that he was under arrest, that he might remain silent, that his answers might be used against him, and/or that he was entitled to counsel. (12 L.Ed.2d 1343).

In determining whether the due process clause of the Fourteenth Amendment is violated, the admissibility of a confession is tested by the same standard in both federal and state prosecutions: whether under all the attendant circumstances the confession was free and voluntary, freely self determined, the product of a rational intellect and free will and without compulsion or inducement of any sort, or whether the accused's will was overborne at the time he confessed.

In light of the above, it is respectfully submitted that Mr. Atchley's confession does not meet the constitutional standards enunciated by the United States Supreme Court. It is, therefore, respectfully prayed that this court determine that his confession was in fact "involuntary", and that its admission into evidence was prejudicial, and in violation of the petitioner's constitutional guarantees.

## IV. *Procedure*

In its Supplemental Return to the Order to Show Cause the State argues that a presumption exists that the petitioner's confession was voluntary. As authority for this statement, it cites 28 USC 2254(d). Analysis of this statute shows, however, that the state's position is untenable.

It provides that such a presumption exists only if the petitioner fails to show that, among other exceptions, the material facts were not adequately developed at the state court hearing or that the state court determination is not supported by the record. It is respectfully submitted that each of these exceptions has been met, and that, consequently, no presumption exists.

## V. *Summary*

Petitioner submits that he has conclusively shown that his constitutional rights were violated. It is, therefore, requested that this court grant his petition.

Dated, September 18, 1967.

E. W. Green,
Bronson, Bronson & McKinnon,
Attorneys for said Petitioner.

Filed September 28, 1967,
James P. Welsh, Clerk.

In the Supreme Court
of the
State of California
IN BANK

Criminal No. 6450

The People of the State of California,
Plaintiff and Respondent,
vs.
Veron Atchley,
Defendant and Appellant.

OPINION

A jury found defendant guilty of murder in the first degree and fixed the penalty at death. The trial court denied his motion for a new trial and sentenced him to death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

Defendant was born in 1917 and was reared in a mountainous community in eastern Tennessee. He attended school only through the third grade and cannot read or write anything except his name. Some time between 1943 and 1946 he moved to California and worked in various localities as an agricultural laborer and a welder. He first met the deceased, Marcella Katherine (Farris) Atchley, when he was working near Fresno in 1953. He saw her a number of times

before he left the Fresno area, and she bore a child that he claims is his. Defendant eventually entered the used car business in Palermo, California. He bought several lots, built houses on them, and lived in one of the houses with Jewel Spoon, a woman who served as his secretary and bookkeeper. He met the deceased again in 1956 when she came to buy a used car. She returned frequently and after a series of fights with Jewel Spoon moved into defendant's home with five of her children. Jewel retired to a trailer behind the house and later left town. Defendant and the deceased quarreled frequently, but late in 1957 they took a trip and were married in Georgia. They did not publicize their marriage, hoping to avoid a reduction in the aid that she and her children were receiving from the county welfare department.

During the last few days of July, 1958, Mrs. Atchley and her children moved out of defendant's home to a house in Gridley, California. Although defendant assisted in making the move, a quarrel ensued and Mrs. Atchley complained to the police. Defendant then informed welfare personnel of her marriage to him. She in turn informed the authorities that defendant had been selling used cars without a license.

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Defendant spent that evening drinking beer with several friends, but there is no evidence that he be-

came drunk. Some time after midnight he drove to his wife's house in Gridley and discovered that she was not there. He drove back to Palermo, looking for her at Robinson's Corners and at several taverns along the way. He then returned to Gridley and drove by her house again. Noticing that her car was still absent, he parked his car about a block away and took from a glove compartment a 22-caliber pistol loaded with six or seven bullets. He placed the pistol inside the belt of his trousers and approached the house on foot through a back alley. He then waited in the alley and in the back yard, where he could see the headlights of his wife's car when she drove in.

About 2:25 a.m. Mrs. Atchley drove up to the carport attached to one side of her house. While she was parking, defendant moved along the opposite side of the house and stood by the front corner. Mrs. Atchley walked around to the front gate and up the walk. As she neared the door, defendant stepped out towards her. In the ensuing few minutes she was shot once in the head, once in the left breast, three times under the right arm, and, according to the prosecution's experts, once in the back. Her body was later found about 3 feet from the front walk on the side opposite the point where defendant had stepped out. She was lying face down with her feet towards the walk and her head towards the carport.

Following the shooting defendant drove back to Palermo. He buried the gun in his back yard and hid the holster in an ash can. He then went to bed, where the police found him about 4 a.m.

At the trial defendant conceded most of the foregoing facts but maintained that he had been told that his wife was going out with another man, that he had taken the gun only to scare them, and that he had no intention of killing or injuring her wife. He stated that when he saw her returning alone, he stepped out to greet her; that his shirttails were tucked in so that the gun inside his belt was clearly visible; that she seized the gun and he struggled to recover it; that the gun went off several times during the struggle; and that after he recovered it, he fired it several more times. The defense introduced much testimony that Mrs. Atchley had said she wished to kill the defendant, that she had threatened him with a gun on several occasions, and that she was a violent and combative person.

Two neighbors testified for the prosecution that they were awakened by the voice of a woman crying hysterically, "Oh, don't, don't" followed by a series of shots. Looking out their bedroom window they saw defendant in a stooping position, shooting towards the ground. Because an intervening fence obscured the body, they assumed that he was shooting at the tires on Mrs. Atchley's car. They and another neighbor, who saw defendant arrive and walk into the back alley, testified that his shirttails were out. Defendant admitted at the trial that the gun inside his belt would not have been visible had his shirttails been out. To rebut defendant's story of a struggle for the gun, the prosecution introduced evidence that all of the shots were fired from such a distance that the deceased could not have been holding the gun at the time, that Mrs. Atchley was

found with her keys still clutched in her right hand, and that five empty cartridge casings were found so close to each other as to indicate that the shots had been fired with the gun in approximately the same position. Other evidence indicated that defendant had threatened his wife, that she was afraid of him, and that most of the threats and all of the acts of violence attributed to her occurred during the period of her conflict with Jewel Spoon.

Defendant contends that the trial court committed prejudicial error in admitting certain evidence. He argues first that certain photographs introduced by the prosecution were gruesome in character, were unnecessary to the prosecution's case, and were offered several days before they were to be used by the expert witnesses for the sole purpose of inflaming and prejudicing the jury.

When allegedly gruesome photographs are presented, the trial court in the exercise of its judicial discretion must decide whether their probative value outweighs their possible prejudicial effect. (*People v. Brubaker, ante,* pp. 37, 48 [346 P.2d 8]; *People v. Carter,* 48 Cal.2d 737, 751 [312 P.2d 665]; *People v. Cheary,* 48 Cal.2d 301, 312 [309 P.2d 431]. In the present case some of the challenged photographs show the deceased as she was found in her front yard, with bullet holes and bloodstains on her dress and blood on her face. They were used to illustrate testimony about her wounds and to show the relative positions in which the body and various items of evidence were discovered. Other photographs show the deceased lying on a

table at the mortuary, naked above the waist, with blood smeared on her face. These pictures were used to show the location and nature of her wounds and to explain the bases for expert opinions as to the position of the gun when the shots were fired. Although many of these photographs are decidedly unpleasant to view, they are not comparable to those held inadmissible in *People v. Redston,* 139 Cal.App.2d 485, 490-491 [293 P.2d 880] or *People v. Burns,* 109 Cal. App.2d 524, 541-542 [241 P.2d 308, 242 P.2d 9], where the deceased was shown with a shaved head and disfigured by an autopsy. In view of their probative value, the trial court did not abuse its discretion by admitting them. It was also within the discretion of the trial court to permit all the pictures taken by the same photographer to be identified at the same time, even though many of them were not to be used until later in the trial.

Defendant also contends that the trial court erred in permitting the introduction of a tape recording of a conversation between defendant and his insurance broker, Ray J. Travers. The conversation took place in the interrogation room of the county jail two days after defendant had been arrested and before he had obtained a lawyer. Defendant was unaware that his words were being recorded and did not know that Travers had formerly been a police officer or that he had agreed to question defendant so that the recording could be made. In response to Travers' questions defendant admitted arming himself, concealing himself, watching and waiting for his wife, surprising her, and

firing several shots while the gun was in his hand. He maintained however, that the shooting occurred during a struggle for the gun and that he had no intention of killing the deceased. Defendant contends that these recorded statements constitute a confession and that they were made involuntarily because Travers held out as an inducement the payment to Mrs. Atchley's children of the proceeds of an insurance policy on her life. The People contend that defendant's recorded statements do not constitute a confession and were therefore admissible even if involuntary.

There has been considerable confusion as to the admissibility in a criminal proceeding of statements allegedly made by the defendant involuntarily. (See *People v. Linden,* 52 Cal.2d 1, 29, footnote 8 ([338 P.2d 397].) Many opinions distinguish "confessions" and "admissions," and state that the latter are admissible without regard to their involuntary character. (*E.g., People v. Adams,* 198 Cal. 454, 465 [245 P. 821]; *People v. Fowler,* 178 Cal. 657, 664-665 [174 P. 892]; *People v. Garcia,* 124 Cal.App.2d 822, 825-826 [269 P.2d 673); *People v. Trawick,* 78 Cal.App.2d 604, 608 [178 P.2d 45]; *People v. Cummings,* 7 Cal.App.2d 406, 408 [46 P.2d 778]; see *People v. Wolfe,* 42 Cal.2d 663, 670 [268 P.2d 475]; *People v. Ferdinand,* 194 Cal. 555, 568-569 [229 P. 341].) The distinctions between confessions and admissions, however, are "subtle and questionable."[1] (*People v. Chessman,* 52 Cal.2d

[1]For example, in *People v. Arnold,* 108 Cal.App.2d 719 [239 P.2d 449], the defendant was charged with murdering two men, Cavness and Greenway. His statement to the police after his arrest that he shot Greenway "because he saw me shoot Cavness"

467, 493 [341 P.2d 679].) Moreover, a number of early cases suggest that even admissions must be excluded if involuntary. (*People v. Shem Ah Fook,* 64 Cal. 380, 381, 382 [1 P. 347]; *People v. White,* 47 Cal.App. 400, 401 [190 P. 821]; *People v. Harris,* 45 Cal.App. 547, 551 [188 P. 65]; *People v. Quan Gim Gow,* 23 Cal.App. 507, 510-512 [138 P. 918].) More recently, this court has stated that "the necessity for determining the voluntary character of the statement does not depend upon whether or not it constitutes a confession of guilt." (*People v. Nagle,* 25 Cal.2d 216, 222-223 [153 P.2d 344]; see *People v. Gonzales,* 24 Cal.2d 870, 874-875 [151 P.2d 251].) We have required preliminary proof of the voluntary character of statements that include "an important incriminating fact." (*People v. Nagle, supra;* see *People v. Eggers,* 30 Cal.2d 676, 689 [185 P.2d 1]; *People v. Quan Gim* Gow, 23 Cal.App. 507, 512 [138 P. 918].) Limitation of the exclusionary rule to full confessions has been rejected not only by the foregoing opinions of this court (*People v. Eggers, supra; People v. Nagle, supra; People v. Gonzales, supra*), but also by the American Law Institute (Model Code of Evidence rule 505) and the National Conference of Commis-

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was characterized as a "statement of his reason for shooting" and held to be an admission, not a confession. In *People v. Cryder,* 90 Cal.App.2d 194 [202 P.2d 765], the defendant made an allegedly coerced confession to robbery and a subsequent statement, also allegedly coerced, that his confession was in the main correct. The latter statement was held not to be a confession. In *People v. Cronevitch,* 86 Cal.App. 646 [261 p. 309], the defendant was charged with burglarizing certain hotel rooms. After he was arrested and some of the stolen property found in his possession, he was asked when he had entered the rooms. His reply that "all the rooms were entered between two and four o'clock, as people were sound asleep at that time" was held not to be a confession.

sioners on Uniform State Laws (Uniform Rule of Evidence 63 (6); see also 78 A.B.A. Rep. 134). Moreover, the Supreme Court of the United States has held that the due process clause of the Fourteenth Amendment requires exclusion of coerced admissions if they are sufficiently damaging. *Ashcraft v. Tennessee,* 327 U.S. 274 [66 S.Ct. 544, 90 L.Ed. 667]; but *cf. Stein v. New York,* 346 U.S. 156, 162-163, footnote 5 [73 S.Ct. 1077, 97 L.Ed. 1522].)

Involuntary confessions are excluded because they are untrustworthy, because it offends "the community's sense of fair play and decency" to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. (*People v. Berve,* 51 Cal. 2d 286, 290, 293 [332 P.2d 97]; see *Watts v. Indiana,* 338 U.S. 49, 54 [69 S.Ct. 1347, 1357, 93 L.Ed. 1801]; *Lyons v. Oklahoma,* 322 U.S. 596, 605 [64 S.Ct. 1208, 88 L.Ed. 1481].) All these reasons for excluding involuntary confessions apply to involuntary admissions as well. (See *Opper v. United States,* 348 U.S. 84, 90-92 [75 S.Ct. 158, 99 L.Ed. 101]; Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43, 68.)

Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily.

The People contend, however, that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evi-

dence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra v. Denno,* 347 U.S. 556 [74 S.Ct. 716, 98 L.Ed. 948]. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the "doctor" a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due process, largely because they were the product of "mental coercion." Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not

render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement. (*People v. Connelly,* 195 Cal. 584, 597 [234 P. 374]; *People v. Castello,* 194 Cal. 595, 602 [229 P. 855].)

While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred.

Defendant contends that the trial court erred in permitting the People to introduce on rebuttal a letter purportedly written by the deceased to Judge Savage two days before she was killed. The letter itemized alleged sales of used cars made by defendant without a license, stated that defendant had threatened the deceased, and expressed her fear of him. Defendant contends that the introduction of this letter on rebuttal was prejudicial because he was unfairly surprised late in the trial and because several prosecution wit-

nesses who could have been examined with regard to the letter and its contents had been finally discharged and could be recalled by defendant only as his own witnesses. The letter was admitted, however, with a limiting instruction, solely to show the deceased's state of mind and not to show that defendant had threatened her. It was therefore not objectionable as hearsay. (*People v. Brust,* 47 Cal.2d 776, 784-785 [306 P.2d 480]; *Adkins v. Brett,* 184 Cal. 252, 255-259 [193 P. 251].) It tended to prove her fear of defendant, which was relevant to defendant's claim that she was the aggressor in a struggle for the gun. Since the claim of self-defense was raised as part of the defendant's case, the letter was admissible in rebuttal.

Defendant contends that the trial court committed prejudicial error in refusing to order the prosecution to produce certain rent receipts and in admonishing the jury to disregard defense counsel's statement that he would prove the receipts to be forgeries. Defendant asserts that he should have been permitted to use the receipts to impeach the prosecution's witness, Barbara Farris, who testified on cross-examination that she had never forged a rent receipt for the deceased and that she had seen the deceased pay rent to defendant and defendant give receipts for it. The question whether rent receipts had been forged to deceive the welfare authorities was clearly collateral to the issues being tried. The trial court had discretion to foreclose further inquiry along that line, even for purposes of impeachment. (See Witkin, California Evidence, § 673.) Moreover, in support of his request

for the receipts, defense counsel offered to show merely that they were forged by Barbara "or someone else." Such a showing with regard to the particular receipts in question might well have been consistent with Barbara's testimony. Its value as impeachment, therefore, was questionable.

Defendant also contends that the trial court erroneously permitted the prosecution to cross-examine him improperly. The assistant district attorney asked him whether or not he had told the truth while testifying under oath in a prior and unrelated criminal proceeding. Defendant argues that this questioning was not proper impeachment and was beyond the scope of matters raised on his examination in chief. (See Pen. Code, § 1323.) On direct examination, however, defendant testified in detail as to the finances of his household, which had apparently given rise to numerous quarrels with the deceased. In particular, he stated that she had paid him no rent. In the prior proceeding he had testified that a certain check constituted payment of rent she owed him. This testimony directly contradicted the statement made by defendant on direct examination. Even though the matter was collateral to the issues being tried, the trial court had discretion to permit the defendant to be questioned for purposes of impeachment as to his own prior inconsistent statement. (See Witkin, California Evidence, § 673.)

Defendant was also asked on cross-examination to demonstrate certain aspects of his alleged struggle with his wife. He argues that this demonstration vio-

lated his privilege against self-incrimination and that it was not proper cross-examination because not restricted to matters about which he was examined in chief. Defendant testified on direct examination that he had been carrying a loaded pistol inside his belt, that his shirttails were tucked in so that the gun was plainly visible, that he had scuffled with his wife for possession of the gun, and that it had gone off during the struggle. On cross-examination he was required to put on the shirt he had worn on the night of the killing, to show how he had carried the gun, and to demonstrate with an assistant district attorney his and his wife's movements during the alleged struggle. These matters were clearly raised by his direct testimony. He was also asked how long his wife's arms were, and replied that they were about the same length as his own. He was then asked to hold the gun at arm's length pointed towards himself with a finger touching the trigger. The distance from the muzzle to his body was measured and found to be 10 inches. This part of the demonstration, in combination with the testimony of the prosecution's experts that the gun was fired from at least 24 inches away, was directly related to defendant's statement on direct examination that the gun had gone off while he and his wife were struggling for it. The entire demonstration, therefore, was within the scope of permissible cross-examination (Pen. Code, § 1323; *People v. Ortiz*, 66 Cal.App. 154, 156 [225 P. 462]), and defendant waived his privilege against self-incrimination as to the matters involved when he voluntarily raised them on direct examination. (*People v. Arrighini*, 122 Cal.

121, 126 [54 P. 591]; *People v. Gallagher,* 100 Cal. 466, 474-476 [35 P. 80]; *People v. Withers,* 73 Cal. App.2d 58, 60-61 [165 P.2d 945].)

Defendant contends that the prosecution was guilty of prejudicial misconduct in its closing argument. The assistant district attorney suggested to the jury that the deceased had been shot initially in the back as she turned to run away. Defendant complains that this suggestion was based on facts not in evidence. There was evidence that a wound in the deceased's back marked the entrance of a bullet. From the position in which the body was found and other evidence, it clearly could be inferred that the deceased had turned to run. Although there was no evidence of the order in which she received the various wounds, the assistant district attorney's suggestion was nonetheless based on a reasonable interpretation of the evidence, and was therefore within the scope of permissible argument. (*People v. Cheary,* 48 Cal.2d 301, 317-318 [309 P.2d 431]; *People v. Burwell,* 44 Cal.2d 16, 39-40 [279 P.2d 744].)

The assistant district attorney also argued to the jury that if the prosecution's eyewitnesses were unable to see the killing from their bedroom window, as the defense had suggested, defense counsel would have requested that the jury view the premises. The basis for defendant's objection to this argument is not clear. It is generally permissible to argue to the jury that an adverse inference should be drawn from the opposing party's failure to produce the strongest available evidence. (*Cf.* Pen. Code, § 1323.) Moreover, defense counsel had ample opportunity to respond to

the argument or to point out that a countervailing inference could be drawn from the prosecution's failure to request a view.

The assistant district attorney misstated the law, however, when he told the jury that the killing of a human being while in the commission of a felony, to wit, assault with a deadly weapon, is murder of the first degree. (See Pen. Code, § 189.) Shortly thereafter he corrected his error and apologized to the jury. The court gave accurate instructions on murder and its degrees, and repeated those instructions at the jury's request shortly before the verdict was returned. It must be presumed that the jury followed the court's instructions and that defendant was not prejudiced by the assistant district attorney's earlier misstatement of the law.

The trial court instructed the jury that murder is in the first degree if perpetrated by lying in wait. (Pen. Code, § 189.) Defendant contends that the court's instructions were erroneous in that they permitted the jury to convict defendant of murder in the first degree without finding malice aforethought. The court, however, clearly defined murder in terms of malice aforethought.[2] The next succeeding instruction differentiated the finding of murder from the

[2]"Murder is the unlawful killing of a human being with malice aforethought.

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured."

determination of degree.[3] All instructions on lying in wait expressly presupposed a finding of murder.[4] Defendant's contention is therefore without merit.

Defendant also contends that there was insufficient evidence to justify giving an instruction on lying in wait. The elements necessary to constitute lying in wait are watching, waiting, and concealment from the person killed with the intention of inflicting bodily injury upon such person or of killing such person. (*People v. Thomas*, 41 Cal.2d 470, 473 [261 P.2d 1].) The testimony of one neighbor indicated that defendant waited behind his wife's house for over an hour. The evidence included admissions by defendant that

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[3]"Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, whether first or second."

[4]"All murder which is perpetrated by means of lying in wait, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree, and all other kinds of murder are of the second degree."

"All murder which is perpetrated by means of lying in wait is murder of the first degree.

"To constitute lying in wait, as the term is used in these instructions, a person's conduct must involve an intent to take another person unawares so as to do him bodily injury, and must include, as a means to that end, a waiting and watching for an opportune time to do the act, and also either a concealment in ambush or some other secrecy of design to take the other person by surprise.

"Lying in wait does not require any particular position of the body, or that the designing person refrain from moving about, or that he entice or trap the object of his design into any strange or puzzling situation, or that the lying in wait continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation."

"When the killing of a human being amounts to murder and is accomplished by lying in wait, it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill, but it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause his death."

he parked a block away to conceal his presence, that he waited behind the house for about 25 minutes, that he was watching for the headlights of his wife's car, and that he surprised her by stepping out "right into her face." From the fact that he had armed himself with a loaded pistol and the evidence indicating that he shot her almost immediately upon her arrival, the jury could reasonably conclude that he was waiting for her with the intention of shooting her and that the shooting was accomplished "by means of" his watching and waiting in concealment. There was therefore sufficient evidence to justify giving the instruction.

Defendant contends that the trial court erred in excluding certain medical testimony as to defendant's mental condition at the time of the shooting. He relies on *People v. Wells,* 33 Cal.2d 330 [202 P.2d 53], which holds that medical testimony as to mental state is admissible to show lack of malice aforethought or lack of premeditation and deliberation. In his offer of proof, however, defense counsel stated that the proposed testimony would bear on defendant's ability at the time of the trial to remember what had occurred. There was no suggestion that it would bear on malice aforethought, premeditation, or deliberation. (*Cf. People v. Wells, supra,* at 345.) The record does not show, therefore, that evidence relevant to these issues was excluded.

Defendant did offer to elicit the doctor's opinion as to whether, in view of defendant's state of mind at the time of the shooting and after his arrest, it would be "normal" for him not to remember the de-

tails of the shooting or his statements to the police. He also proposed to ask the doctor about the reflex action of the trigger finger of a person under stress. The trial court ruled that the jury could evaluate these matters without the help of an expert. Both the mental stress created by involvement in a killing and the effect of such stress on finger reflexes, however, were "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole,* 47 Cal. 2d 99, 103 [301 P.2d 854, 56 A.L.R.2d 1435]; *George v. Bekins Van & Storage Co.,* 33 Cal.2d 834, 844 [205 P.2d 1037].) As to both matters, therefore, the trial court's ruling was erroneous.

The erroneously excluded evidence was significant because defendant relied primarily on the theory that the shooting was accidental or in self-defense. Since no other witness observed the first shots, it was critical whether the jury believed his story of a struggle for the gun. The proposed testimony as to reflexes might have served to render that story more credible by providing an explanation of why so many shots were fired and why defendant continued to shoot after recovering possession of the gun. The proposed testimony as to defendant's inability to remember might have served to make defendant appear more truthful by rebutting the prosecution's suggestion that he was lying about his memory.

Upon examination of all the evidence, however, it does not appear that the erroneous exclusion of this medical testimony resulted in a miscarriage of justice. (See Cal. Const., art. VI, § 4½.) Although the testi-

mony as to reflexes might have made defendant's story of a struggle more credible, there was abundant evidence inconsistent with a struggle, including the distance from which the shots were apparently fired, the proximity in which the five empty cartridge casings were found, the fact that defendant had armed himself and waited for his wife, the cry heard by the neighbors, and the fact that virtually every bullet in defendant's gun entered her body. Although the testimony as to defendant's inability to remember might have met one line of attack on his credibility, other lines of attack were given far more emphasis by the prosecution. Defendant was shown to have lied repeatedly to the police after his arrest and to have lied under oath in a prior criminal proceeding. Moreover, his credibility was important primarily as it affected the jury's belief in his story of a struggle for the gun. The evidence inconsistent with that story was abundant and convincing. There is therefore no reasonable probability that admission of the excluded medical testimony would have persuaded the jury to reach a different result. (See *People v. Watson,* 46 Cal.2d 818, 836 [299 P.2d 243].)

The judgment and order denying a new trial are affirmed.

Traynor J.

Gibson, C.J., Schauer, J., Spence, J., McComb, J., Peters, J., and White, J., concurred.

Appellant's petition for a rehearing was denied December 30, 1959.

Filed, December 1, 1959,
William I. Sullivan, Clerk.

In the United States District Court
Northern District of California

No. 46,688

Veron Atchley,
*Petitioner,*

vs.

Lawrence E. Wilson, Warden,
California State Prison,
San Quentin, California.
*Respondent.*

## MEMORANDUM OF DECISION ON PETITION FOR HABEAS CORPUS

Veron Atchley brings this habeas corpus petition pursuant to 28 U.S.C. § 2241 *et seq.*, to secure his release from an allegedly unconstitutional confinement in San Quentin State Prison. After having pleaded not guilty, he was convicted of first degree murder on January 7, 1959, and was sentenced to death. The California Supreme Court affirmed the conviction and sentence, *People v. Atchley*, 53 Cal. 2d 160, 346 P.2d 764 (1959). A writ of certiorari was granted but subsequently dismissed by the United States Supreme Court as having been improvidently granted. *Atchley v. California*, 366 U.S. 207, 81 S.Ct. 1051, 6 L.Ed.2d 233 (1961). Atchley's sentence was commuted to life imprisonment without possibility of parole in 1961, and was further commuted to allow parole in 1966.

In this application, petitioner primarily raises two constitutional claims. First, he argues that the procedure employed by the trial court for determining the voluntariness of petitioner's confession failed to satisfy federal constitutional standards. Secondly, he argues that the tape-recorded confession which was extracted from him was involuntary, and hence, inadmissible. At his trial and on his automatic appeal petitioner challenged the admissibility of his tape-recorded statements. Further, he alleges that all the grounds raised in this petition were presented in a habeas corpus petition to the California Supreme Court, which was denied on January 18, 1967, apparently without opinion. Under the rule announced in *Castro v. Klinger,* 373 F.2d 847 (9th Cir. 1967), petitioner has satisfied the exhaustion of remedies requirement of 28 U.S.C. § 2254 (1958), as amended 28 U.S.C. § 2254 (1966).

On March 9, 1967, an Order to Show Cause was issued by this Court. After respondent filed his return and a hearing was held, it was determined that counsel should be appointed and that a second non-evidentiary hearing should be held after further briefing by the parties. On September 28, 1967, the further hearing was held.

The facts upon which petitioner's claims are based can be briefly summarized. At Atchley's trial for the murder of his wife, the prosecution proposed to introduce a tape recording of a conversation between Atchley and one Ray J. Travers. Defense counsel requested, and the Court granted, a preliminary examination in chambers to permit defense counsel to state

his objections to the introduction of the tape-recording. In chambers, the objection was made, among others, that Atchley's statements on the tape "were not given freely and voluntarily . . ." (Reporter's Transcript, Vol. IV, p. 942, 1.5 hereafter cited thusly: R.T. IV, 942, 1.5.) Defense counsel further objected because the defendant, when making the statements, was unaware that the conversation was being secretly recorded, or that Travers had been requested to elicit Atchley's statements by the Undersheriff, Officer Spann; the objection was also raised that "the defendant was tricked into making a declaration to his insurance broker [Travers] which he felt was a private and confidential communication to his broker concerning a policy of life insurance on the decedent; that it was not given to be transcribed or taken down." (R.T. IV, 942, l. 24-943, 1.3.) The tape-recording was then played, in which Atchley admitted arming himself, concealing himself, watching and waiting for his wife, surprising her and firing several shots while the gun was in his hand.

At the outset of the recording, Travers told Atchley that "I won't write none of this down. I can remember. I don't want nothing on paper." (R.T. IV, 951, l. 5-8; 953, l. 4-9; 954, l. 21-23.) Among other things, Atchley stated that from the time of his arrest at approximately 4:00 a.m. on August 3, until the conversation with Travers around noon on August 5, he had been kept "pretty well occupied . . . pretty well isolated." (R.T. IV, 956, l. 23-24.) Further, Atchley indicated that he had been trying to get an at-

torney before the conversation with Travers. (R.T. IV, l. 4-5.)

After the tape was finished and while still in chambers, defense counsel frequently renewed his objection that the statements elicited by Travers from Atchley constituted a confession and that they were not freely and voluntarily given. In response, the prosecutor stated that he would lay a foundation showing that the statements were freely and voluntarily given. The judge ruled that the statements on the tape "may approach the nature of a confession and that therefore before the tape is used I think the same foundation should be laid as is used for the introduction of a confession." (R.T. IV, 982, l. 1-3; 986, l. 5-11.)

With this in mind, two later rulings of the trial judge in chambers are significant. Defendant raised the objection that the tape contained a communication which Atchley intended to be private between himself and Travers, made for the definite purpose of helping the decedent's children, one of whom Atchley claimed was his, to recover under the decedent's life insurance policy. The trial judge ruled that such evidence would go to the weight but not to the admissibility of the tape (R.T. IV, 990, l. 4-6). Secondly, defense counsel asked to recall the Undersheriff, Officer Spann, who allegedly had asked Travers to elicit the confession from Atchley, for cross-examination. The reason given was that "since this other matter has come up [presumably the voluntariness issue] . . . it would be extremely prejudicial to the defendant's case if I were not permitted to ask him before he [the

prosecution] put the insurance agent on the stand . . ." (R.T. IV, 992, l. 21-26). The Court apparently ruled that the cross-examination would be limited to matters covered on direct examination (see R.T. IV, 994, l. 5-8). The officer had not been examined in connection with the tape recording when he had been called earlier by the prosecution.

In the presence of the jury, at the hearing on the issue of voluntariness,[1] Travers testified that he had visited the jail in the morning of August 5 and conversed with Atchley at Atchley's request. After that conversation, Travers admitted that he was asked by the undersheriff to engage Atchley in a second conversation which would be recorded and that he complied with the request, Travers further testified that he offered no threat, promise or inducement to Atchley.

On cross-examination, Travers acknowledged that he was a good friend and the insurance agent of Atchley. At this time defense counsel indicated that Atchley was unable to read or write, although these facts were not clearly established until later in the trial when Atchley took the stand in his own defense. It was also at this time that the trial judge in effect ruled that no constitutionally impermissible inducement could have occurred from the fact that Atchley had made his statements to Travers in the belief that

[1]An examination of the Reporter's Transcript clearly shows that both counsel and the court understood the purpose of the hearing was to determine whether the tape-recorder confession had been voluntarily given (See R.T. IV, 1002, l. 18-21; 1003, l. 8-12, l. 22-24; 1004, l. 20-22; 1005, l. 8-12, l. 13-15).

Travers, in his capacity as insurance agent, was seeking information in order to protect the rights as beneficiaries of the decedent's children (R.T. IV, 1005, l. 13-15). Moreover, when defense counsel offered to establish that Atchley had told Travers that he had requested a lawyer on numerous occasions from the sheriff's department and that he had not been permitted to talk with a lawyer prior to that time, the prosecution objected on the ground that "whether the man wanted a lawyer, had a lawyer or intended to get one has nothing to do with the freeness and voluntariness of the statement." (R.T. IV, 1009, l. 22-25.) Sustaining the objection the trial judge ruled that whether Atchley "did or did not have a lawyer has no bearing on this particular point." (R.T. IV, 1010, l. 19-22.) Further, the trial judge sustained another objection to questions relating to the conversation between the undersheriff and Travers on the ground that what the undersheriff Spann "may or may not have said about this man, about what he wanted him to bring out on the tape . . ." was irrelevant (R.T. IV, 1012, l. 13-19). Finally, the Court sustained an objection on the grounds of irrelevance to the question whether or not Atchley knew that the conversation was being recorded. The tape was then played before the jury, and admitted into evidence, after the trial judge noted the objections of the defendant and stated that the court had ruled upon them.[2]

[2]The tape was also relied upon heavily by the prosecution to impeach petitioner's testimony when he took the stand in his own behalf (See R.T. VI, 1368, 1642, 1671, 1678-82, 1725-26, and 1758).

After the tape had been played and admitted, Travers was further cross-examined by defense counsel. At this time he admitted that Atchley didn't have a lawyer and was trying to obtain one at the time he had made the statements which were recorded. Travers further admitted that he had been a deputy sheriff for three and one-half years, with experience in "homicides and all felonies", and that in questioning Atchley, he had followed a "general routine of asking questions, as a line of interrogation . . ." (R.T. IV, 1027, l. 25-1028, l. 2).

In each ruling discussed above, the trial court excluded relevant and perhaps crucial evidence on the issue of whether the confession was voluntary. Evidence that the confession was extracted while the accused was attempting to get a lawyer, had been refused a lawyer, or merely had communicated to the police his desire to have a lawyer clearly bears on whether the confession was voluntary or whether the will of the accused was overborne. *Reck v. Pate,* 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed. 2d 948 (1961); *Culombe v. Connecticut,* 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed. 2d 1037 (1961).[3] Moreover, evidence that Travers feigned sympathy for his friend, Atchley, deceived him about his motives in order to extract a confession certainly would be material to the issue. *Spano v. New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed. 2d 1265 (1959); *Leyra v. Denno,* 347 U.S. 556, 774 S.Ct. 716, 98 L.Ed. 948 (1954). For the same

[3]Later in the trial, Atchley testified that prior to the confession, on some ten occasions, he had told the officers he wanted an attorney (R.T. VI, 1502, l. 21-1503, l. 2; VI, 1677, l. 21-24).

reasons, the evidence relating to whether or not Atchley knew that the tape was being recorded would also be material. Further, the testimony of Officer Spann as to what Spann said to Travers before the tape-recorded confession was elicited could be material to a determination of voluntariness based on all the circumstances. To have limited the proposed cross-examination of Spann to those matters covered in direct examination may have deprived the judge of certain facts necessary to make a competent finding. Finally, evidence relating to Atchley's mental condition, whether he was able to read or write and the extent of his education would all bear on the voluntariness of the confession. *Culombe v. Connecticut, supra; Reck v. Pate, supra, Davis v. North Carolina,* 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966.)[4] While the trial court did not directly exclude evidence of this nature, the prosecution objected to one question along this line on the ground that whether the de-

[4]Later in the trial, when Atchley took the stand in his own defense, he stated that he had attended school for two or three months a year through the third grade, and that he was unable to read or write (R.T. V, 1416, l. 8-17). He testified that immediately after his arrest, while being questioned by the local officers, he "was in the highest shock" and on the stand testified that he was unable to remember what he had told the officers during these periods of questioning (R.T. VI, 1614, l. 1; 1615, l. 4-5; 1616, l. 8-10; 1624, l. 1-2; 1627, l. 1-2). At another point Atchley testified that during that period immediately after his arrest, "I might have said anything to get them to quit questioning me and let me go to bed and sleep" (R.T. VI, 1693, l. 9-12). Finally, when Atchley's sentence was commuted to life imprisonment without possibility of parole in 1961, the Order of Commutation notes that Atchley possessed an I.Q. of 60 and had suffered damage to his brain and central nervous system from a blow received in 1956. (Ex. A to Petition for Habeas Corpus.) Atchley's testimony in his own defense, particularly when cross-examined by the prosecutor, reveals a subnormal level of intelligence and understanding.

fendant could read or write didn't bear on the voluntariness of the confession and in the ensuing colloquy the response to that question was never obtained. (See RT., IV, 1002, l. 12-1004, l. 25.)

All this is not to say that this Court is presently able to say that the confession was involuntary. However, had the trial court developed the facts discussed above and other facts,[5] resolved the conflicts and discrepancies in the evidence, and engaged in the necessary close scrutiny of the totality of the circumstances under which the confession was extracted (*Gallegos v. Colorado,* 370 U.S. 49, 52, 55, 82 S.Ct. 1209, 8 L.Ed. 2d 325 (1962)), then the trial court could have more competently determined whether Atchley's will was overborne.

In light of the above discussion, it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary. The hearing on voluntariness was not "fully adequate to insure a reliable and clear-cut judicial determination of the voluntariness of the confession", as required by *Jackson v. Denno,* 378 U.S. 368, at 391, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964). In that case, the Supreme Court held that the trial court procedure employed did not afford

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[5]For example, there is no indication from the record, nor was it a subject of inquiry during the hearing on voluntariness, whether the police advised Atchley of his right to remain silent, that his answers might be used against him, or of his right respecting counsel. In *Davis v. North Carolina,* 384 U.S. 737, at 740, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966) the Supreme Court stated that such information "is a significant factor in considering the voluntariness of statements later made."

a reliable determination of the voluntariness of the confession offered in evidence, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession, and therefore would not withstand attack under the Due Process Clause of the Fourteenth Amendment. The Court therein stated, at 380, 84 S.Ct. at 1783, that "[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." The Court stated that the procedure to be followed must be "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." (378 U.S. at 391, 84 S.Ct. at 1788.)[6]

Assuming that the trial court made an independent determination that the confession was voluntary[7] as

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[6]There appears to be no question that the rule enunciated in *Jackson v. Denno* is to be applied retroactively; that is, to convictions, such as Atchley's, which had become "final" in the sense that the ordinary methods of review, such as appeal or certiorari had already become exhausted or the right to utilize them had expired through passage of time, before *Jackson* was decided. *Linkletter v. Walker*, 381 U.S. 618, 639, n. 20, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965); *Johnson v. New Jersey*, 384 U.S. 719, 727-28, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966); *Pinto v. Pierce*, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed. 2d 31 (1967); see Annot., "Retroactive or Merely Prospective Operation of New Rule Adopted by Court in Overruling Precedent—Federal Cases", 14 L.Ed. 2d 992, 1011-12 (1966).

[7]The record here is confusing as to exactly when the trial court made its determination that the confession was voluntary. Certainly that determination does not appear with the "unmistakable clarity" required by *Sims v. Georgia*, 385 U.S. 538, 87 S.Ct. 639,

required by *Jackson v. Denno, supra,* the fact that the hearing on the issue of voluntariness was held in front of the jury would raise no constitutional question. *Pinto v. Pierce,* 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed. 2d 31 (1967). However, for the reasons given above, the procedure used and the standards followed by the trial court did not satisfy the requirements of *Jackson v. Denno, supra;* see *Mitchell v. Stevens,* 353 F.2d 129 (8th Cir. 1965). As the Supreme Court stated in *Boles v. Stevenson,* 379 U.S. 43, at 45, 85 S.Ct. 174, at 176, 13 L.Ed. 2d 109 (1964), in a case following *Jackson v. Denno,* petitioner "is entitled to a hearing in the state courts under appropriate procedures and standards designed to insure a full and adequate resolution of this issue." Accordingly, the writ of habeas corpus is granted unless the State, within a reasonable time, affords Atchley either a hearing on the issue of voluntariness which is consistent with the requirements of due process or a new trial, failing which Atchley is entitled to his release.[8]

17 L.Ed. 2d 593, at 598 (1967). Moreover, the record is clouded by the uncertainty in the trial court's statements as to whether Atchley's statements constituted a confession or merely admissions. This confusion is heightened by the fact that no instructions were given to the jury regarding the confession or the jury's role in viewing the confession. Prior to the adoption of the new Evidence Code by California, effective January 1, 1967, the failure to give appropriate instructions regarding the jury's role in viewing confessions constituted reversible error. See *People v. Bevins,* 54 Cal.2d 71, 76-77, 4 Cal.Rptr. 504, 351 P.2d 776 (1960).

[8]Alternatively, this Court concludes that, as has been shown, the trial court followed an erroneous standard of law in determining that the confession was voluntary. The remedy set forth above is still appropriate. See *Jackson v. Denno,* 378 U.S. 368, 394 n. 22 (1964). Under either theory, the Court is of the opinion that petitioner has successfully rebutted the presumption contained in 28 U.S.C. § 2254(d), as amended by Public Law 89-711, 80 Stat. 1104 (1966).

If it should be determined on a subsequent hearing that Atchley's confession was involuntary, then the State would be required to afford Atchley a new trial. *Jackson v. Denno,* 378 U.S. 368, 394, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964). Because of this holding, the Court need not decide the other issues advanced by petitioner in his application for the writ of habeas corpus.

So ordered.

Dated: January 19, 1968.

Robert F. Peckham,
United States District Judge.

Filed January 22, 1968,
James P. Welsh, Clerk.

United States Court of Appeals
for the Ninth Circuit

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|---|---|
| Lawrence E. Wilson, Warden, *Appellant,* vs. Veron Atchley, *Appellee.* | No. 22,735 |

[May 27, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES, HAMLEY, and BROWNING, Circuit Judges

PER CURIAM:

The judgment is affirmed for the reasons stated in the district court's opinion, 300 F.Supp. 68 (N.D. Calif. 1968).

BARNES, Circuit Judge (dissenting):

Appellee was a petitioning state prisoner in the court below. He had been convicted of first degree murder and sentenced to death. The California Supreme Court affirmed the conviction and sentence. (People v. Atchley, 53 Cal.2d 160, 346 P.2d 764 (1959).) Certiorari to the Supreme Court of the United States was granted, and then dismissed as improvidently granted. (366 U.S. 207, 81 S.Ct. 1051, 6 L.Ed. 2d 233 (1961).) Appellee's sentence was later commuted to life imprisonment without possibility of

parole in 1961, and was further commuted to allow parole in 1966. Appellant petitioned the United States courts for a writ of habeas corpus. This was denied, without a hearing, and the denial affirmed upon the ground there was no lack of due process. *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

This is an appeal, therefore, from a second petition for a writ of habeas corpus based on the claim (1) petitioner's confession was improperly admitted into evidence; (2) the trial court erroneously excluded evidence as to petitioner's mental condition; (3) that no hearing was held outside the jury's presence to determine the admissibility of petitioner's extra-judicial statement.

The Supreme Court of California specifically recognized the general rule of the inadmissibility of confessions, or any statement made by the accused relative to the offense charged, if made involuntarily. It passed upon the admission of appellee's "implicating statement" by stating:

> "The People contend, however, that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evidence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an

inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

"Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra v. Denno,* 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed 948. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due process, largely because they were the product of 'mental coercion.' [footnote omitted] Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not a type reasonably likely to procure an untrue statement. *People v. Connelly,* 195 Cal. 584, 597, 234 P. 374; *People v. Castello,* 194 Cal. 595, 602, 229 P. 855." 53 Cal.2d 160 at 170-171, 346 P.2d 764 at 769.

Thus we see there was an in-chambers hearing of the tape recording, outside the presence of the jury, prior to any ruling by the state trial judge on admissibility.

Likewise, the California Supreme Court had before it, and considered, the second error listed above—the exclusion of medical testimony as to defendant's mental condition at the time of the shooting. The court concluded this was not error because never offered or raised below. *Id.*, p. 176, Key ¶ 20, 346 P.2d, p. 773. The harmless error found by the Supreme Court of California in the exclusion of certain expert opinion testimony was with respect to defendant's reflexes and memory, not to the accused's mental condition at the time of the shooting.

The California Supreme Court also found there was "substantial and uncontradicted evidence that no coercion occurred." *Id.*, p. 171, 346 P.2d, p. 770.

I turn to 28 U.S.C. § 2254. Keeping in mind the findings of the California Supreme Court, I must ask, was this "a determination after a hearing on the merits of a factual issue"? I think it was. It was "made by a state court of competent jurisdiction." This was "in a proceeding in which [this] applicant for the writ and the state or an officer or agency thereof were parties." It was made in a "written opinion." It must therefore "be presumed to be correct" unless the applicant can bring himself within any one of the exclusions of 28 U.S.C. § 2254, numbered 1 to 8.

In considering these exclusions (there being no admissions by the respondent state) the burden is on the applicant to establish the exception.

With this in mind I turn to the district court findings in this case. It first determined that it was

presently unable "to say that the confession was involuntary." (C.T. 73.) If the court was unable to do so, then, if I read § 2254 correctly, the applicant has not met the burden of proof required by that section.

The district court said that the state trial court did not "reliably" determine whether Atchley's confession was voluntary or involuntary, following the language of *Jackson v. Denno,* 378 U.S. 368, 391, 84 S.Ct. 1774, 12 L.Ed. 908 (1964). As pointed out above, the Supreme Court of California referred to the "proper showing" made in the trial court "that his statements were made voluntarily."

It seems improper to me for a federal court, ten years after the event, after examining a record from which it cannot conclude the confession was involuntary, and without pointing out (except for general and conclusionary language) any evidence of convincing force that the confession was an involuntary act—to require an evidentiary hearing in the state courts.

Without any recital of a factual showing by the petitioner that he falls within the § 2254 exceptions, the purpose of the "showing required to offset the presumption created by the statute," is meaningless.

The legislative history of 28 U.S.C. § 2254 shows that it was passed "to prevent the abuse of the writ of habeas corpus" by state prisoners in federal courts.

> "[S]uch purposes are to be attained by provisions for a qualified application of the doctrine of res adjudicata in Federal court habeas corpus proceedings brought by State prisoners, by provisions

> according a presumption of correctness to factual determinations made at a hearing on the merits by State courts and by provisions with respect to the burden of proof in Federal court proceedings for habeas corpus by State prisoners." 1966 U.S. Cong. & Adm. News, p. 3663 at 3666.

The statute adopted by the Congress in 1966 says it places "the burden shall rest on him [petitioner] to establish by convincing evidence that the factual determination by the State court was erroneous." *Id.*, p. 3667.

I do not think that here it can fairly be stated that such "convincing evidence," existed, and I would reverse the district court's decision, and deny the petition, in an attempt to follow congressional dictates.

Mr. Grinnell (Assistant District Attorney): That is all, you may cross examine.

Mr. King (Defense Counsel): No questions.

(The following comments were made out of the hearing of the jury:)

Mr. King: If counsel is going to attempt to introduce a tape recording I do request, Your Honor, to have a preliminary examination of the tape recording [937] so that my objections can be properly had.

Mr. Mulkey (Assistant District Attorney): Then this will be ——.

The Court: It would be granted. How long will it take? Fifteen minutes?

Mr. Mulkey: It is so short ——.

(In the hearing of the jury again:)

The Court: At this time, Ladies and Gentlemen, we will take a recess for 15 minutes. Please bear in mind the instructions of the Court not to discuss the case with your fellow jurors or with any other person and not to form an opinion or conclusion.

I will see Counsel and the Clerk and the Reporter in Chambers at this time.

(Thereupon the Court, Officers of the Court, Counsel for the People, Counsel for the Defendant and the Defendant convened in the Chambers of the Court, where the following proceedings were had:)

The Court: This is a hearing out of the presence of the jury at which the defendant is present.

Mr. Mulkey, would you present the matter that you presented to the Court when you and counsel for the defendant approached the bench.

Mr. Mulkey: We have a tape recording of a conversation between the defendant and Mr. Travers.

[938]

Mr. King: What is his last name?

Mr. Mulkey: Travers.

The Court: T-r-a-v-e-r-s?

Mr. Mulkey: Yes. We, of course, must lay a foundation for the tape and we will do so through Mr. Travers. However, because of the delay of our witnesses at this time I felt that after the foundation was laid Mr. King would want a hearing in Chambers to have this tape played. I am therefore offering that at this time. Then I will put Mr. Travers on the stand and lay a foundation for this tape. But this is the tape I propose to play (indicating).

The Court: Now let me understand your proposal, Mr. Mulkey. After laying the foundation as to the time and place and people present of this conversation did you expect the witness Mr. Travers to testify to what the defendant said?

Mr. Mulkey: No, sir. I expect the witness Travers to identify and testify this tape truly records the conversation he had between him and the defendant at the time and place it was taken, and then to play it to the jury.

The Court: Now, for the record would you explain further as to the extent of the knowledge and information of the attorney for the defendant relative to this tape.

Mr. Mulkey: Well ——.

The Court: You see, I have not been in on ——.

Mr. Mulkey: The attorney for the defendant heretofore, and before this Court requested an order [939] directing that we turn over to him prior to the trial of this cause all of our tape recordings to the defendant ——.

The Court: Including this one?

Mr. Mulkey: I don't think this one was mentioned, but this one was also turned over to him pursuant to that order. And this tape was played in the presence of defense counsel, the defendant himself, and in front of the court reporter, and was duly transcribed by the court reporter, a copy of that transcription being in Mr. King's hands and another copy in our hands.

The Court: Do you have any objection to proceeding in that fashion, Mr. King?

Mr. King: Yes, I do, Your Honor.

The Court: What is the basis of the objection?

Mr. King: On my notice of motion heretofore made in this Court concerning conversations had by the defendant with certain peace officers, which conversations were in the hands of the District Attorney, they did let me hear some transcribed tapes at some considerable length. At my own expense I had a court reporter take down what he could hear from the transcription of the tape recording. Now, I was not aware at the time of my notice of motion that there was any conversation had with this man referred to as Ray Travers, an insurance agent. It was, however,

on the tape which was partially transcribed by the court reporter. I will say this so the Court will be [940]

aware of how this tape recording got into this transcription. As I have found out, the defendant was taken down into the attorneys' conference room in the local jail, that the conference room in the local jail was bugged and there was a hidden microphone in the wall, walls of the room or nearby, which did take down a conversation had by the defendant and the insurance agent; that the defendant was unaware that his conversation was being taken down; that he knew nothing at all about his conversation had with the insurance—withdraw that—knew nothing about—that the conversation was taken down. He felt that his conversation with the insurance agent over a matter of insurance business was a private conversation. He did make certain declarations in that transcription which if made before the jury would be highly prejudicial to his rights; that he did not give the statements except in a confidential manner to his insurance broker; that it is evident from the conversations transcribed that the insurance broker was sent in there by the sheriff's office to elicit information that the defendant might have concerning the case; that the tape recordings are immaterial, privileged, they are self incriminating ——.

The Court: Pardon me. Now what were your points again, Mr. King.

Mr. King: That the tape recording so taken was privileged.

The Court: What privilege?

[941]

Mr. Mulkey: Yes, what privilege?

The Court: You mean attorney-client?

Mr. King: Insurance broker and client; that they were self incriminating and it violated his privilege of self incrimination; that they were not given freely and voluntarily; that they are not the best evidence. Further, that there—they are inaudible; that they were secretly made; that they are prejudicial; that they contained evidence that is immaterial and incompetent; that there is obviously, from hearing the record and from reading the transcription of that record, that only parts of the conversation were recorded; that there was very evidently a conversation had with this man which was previously had with this man Roy —what is his name again?

Mr. Mulkey: I have given you his name.

The Court: Travers.

Mr. King: Travers—which was not taken down by recording, but that this recording was turned on only at a point in the defendant's conversation with the insurance broker where it would best serve the interests of the prosecution. Further, that the recording machine very obviously was turned off and on at certain stages of the recording and it does not truly give us a complete account of the conversation had at that time. In other words, if the Court please, the defendant was tricked into making a declaration to his insurance broker which he felt was a private and confidential communication to his broker concerning

[942]

a policy of life insurance on the decedent; that it was not given to be transcribed or taken down. And I might say further, Your Honor, that all during the progress of this case I have found out that the counsel

room in the local jail is bugged and that all conversations had with people, whether or not lawyer or client, can be taken down. It has been extremely difficult, knowing that, to have any conversation with my client in the confines of the jail.

Mr. Mulkey: Just a moment. I don't think that goes to this objection.

Mr. King: Without knowing it was taken down.

Mr. Mulkey: That doesn't go to this objection in any shape or form.

The Court: The Court is giving it the credit it is entitled to.

Mr. King: I seriously object to the lawyers' room in the jail being bugged and ——.

The Court: We are not going into that matter.

Mr. King: I will continue my objection, if the Court please. Now, these omissions that I have discussed heretofore could be made at the whim of the operator of the recording device. Very evidently the recording device was outside of the room and being controlled by one of the sheriff's deputies or someone under his supervision. Now, I respectfully submit that a statement of this kind where only the parts that the District Attorney would like to have offered to the jury, would be played to the jury, would be extremely [943]

prejudicial and should not be permitted.

Mr. Grinnell: First of all, Your Honor, if I may answer just that one point, it is evident from listening to the tape, and Mr. Travers will so testify, that that constitutes the entire conversation. And it will be evident from listening to the tape that it was not turned off and on.

Mr. Mulkey: May I play the tape then in answer to Mr. King's ——.

Mr. Grinnell: About five or ten minutes to listen to the entire tape, and then I think all of Mr. King's objections will be ——.

Mr. Mulkey: I will then argue the motion.

The Court: No. I am going to pass on to certain matters first and that will simplify it. First, the communications are not privileged under any rule of law that recognizes privilege. The fact that they are self incriminating is not a violation of the Federal Constitution or the State Constitution. At this time, Mr. King, the Court will instruct you not to make an objection on that ground again.

Mr. King: You mean in the presence of the jury?

The Court: In the presence of the jury.

Mr. King: No, I will not, Your Honor.

The Court: It gives a false impression.

Mr. King: You mean you are calling my attention to the objection heretofore made in the record several days past? I misnamed the section, if the Court please, [944]
and it was through inadvertence and mistake.

The Court: Well, I wasn't concerned—I don't know whether it is paragraph five or what paragraph it is. Anyhow it is the guarantee against self incrimination. Now, a person can not be required to testify against himself. That does not go to admissions that he may make to other people. And for you to base an objection on that ground is misleading to the jury and I am instructing you at this time not to use that objection.

Mr. King: Very well, Your Honor.

The Court: Under those circumstances.

Mr. Grinnell: Of course, Your Honor, it is always incumbent upon the People to show these statements were freely and voluntarily given, and that will be part of our foundation. If Mr. King could show me they were given under duress that possibly—that objection might lie.

The Court: Well, that goes to the weight to be given to admissions. If it is a full-fledged confession that is in a different category, and there it does have to be voluntary. But as to admissions, the foundation that it was voluntary does not have to be laid, whether it was or was not voluntary, and to what extent it was voluntary is a matter of cross examination and goes to the weight of the admission. The point that the tape is inaudible and the point that it may contain matter that is incompetent, irrelevant and immaterial,

[945]

may be good. And it is necessary and proper for the Court to hear the tape. And I would like to hear it at this time in order to pass on those portions of the tape. I will pass on one further subject at this time: As to whether or not the tape contains the entire conversation between the witness and the defendant is a matter, of course, that can be developed on direct examination or on cross examination. All right. Will you play the tape please at this time.

Mr. Grinnell: You want to take this down?

The Court: No. First let me ask you this: Mr. Mulkey has handed me a typed transcript now of this tape which begins on page 43. Now, was Mr. King given a copy of this transcript?

Mr. Grinnell: Yes. He has it in his hand, Your Honor.

The Court: When was it given to him?

Mr. Grinnell: About a week ago, didn't we, Joe? We had it for at least a week before the trial started.

The Court: A week before the trial started?

Mr. Grinnell: Yes.

The Court: All right.

(Thereupon the tape recording referred to was played.)

Mr. King: I feel the reporter should take it down, Your Honor, for this reason: That there are several places in the tape where Your Honor will find the conversation, I am sure, if it is the one I am thinking of, when I heard it, it was inaudible and——

[946]

Mr. Mulkey: You are not thinking of the right tape.

Mr. King: —and I feel that——.

Mr. Grinnell: In view of the fact he has taken it down once already I won't press the point. But do you want him to take it down again?

Mr. King: If he can hear it.

The Court: I think the defendant has a right to require it if he wishes to.

Mr. Mulkey: May it be stipulated, Your Honor, that ff the reporter does not get it clear he may take the tape and play it 100 times if he likes to to get it?

Mr. King: I don't think that would bring the information to Your Honor. Your Honor is going to have to pass on a very vital matter here and——.

Mr. Mulkey: His Honor is not going to have the benefit of the court reporter's notes to pass on it anyway.

The Court: Now, just a minute, Gentlemen.

Mr. Grinnell: I think we are arguing about something that—. This tape is very audible.

Mr. King: Are you getting that portion of the tape (indicating court reporter)?

The Court Reporter: No.

Mr. King: Just a moment. May we stop the recorder?

Mr. Grinnell: It has not got started yet.

Mr. King: I want to get the first part.

[947]

Mr. Mulkey: I will stop it if he tells me to.

Mr. King: May we stop the recorder and start over again?

The Court: No. I want to hear the tape at this time.

(Thereupon the court reporter heard the following from the tape recorder:)

"Q. I see no reason why the Court wouldn't give it to him. I'll be darned.

A. I see her sister down here trying to do something about it.

Q. Who is that?

A. Her sister.

Q. Oh. Wonderful. What is her sister's name?

A. Helen.

Q. That is Marcella?

A. Yes.

Q. And her last name is what?

A. I forget what her last name is. Anyhow she didn't want to have the kids with them down there or no say-so over there. I was supposed to have the say-so over the money.

Q. Of the life insurance?

A. Yes.

Q. That's still in the underwriting department, Jack, that money, and you have the binder. Now, you have got the binder that was given Marcella?

A. No, she had it in her billfold.

Q. But it is in her personal effects now?

A. Yes.

Q. Fine.

A. You will have to go over to the morgue.

Q. I can get that over at Gridley.

A. Yes. And they can't touch it.

Q. I got the sheriff's office—been very nice. They are going to have photostatic copies made of the marriage license. That is very important, [948]
Jack, that you were married.

A. Yes.

Q. It is a terrible thing, isn't it?

A. Yes. She lied about it all the way around.

Q. Terrible thing?

A. Yes. She thought we wasn't married

Q. She thought you weren't married?

A. Yes. What I can't understand is what the hell she told Goldfine about it.

Q. I don't know. Darnedest thing I ever heard. Can't understand it.

A. At the welfare department she told them she wasn't married.

Q. I'll be darned.

A. Yes, sir.

Q. Can't understand it. Goofiest thing. This is really something. See, we are interested too really how the darn—I mean, hot (sic) it come about, you know, like you were telling me this morning, and I have got to write a letter to that ——.

A. I tell you what to do. I want you to go over there where she lives, see.

Q. In Gridley?

A. Yes. And go to the corner of the house there right next to the front door. And she was standing—she come right up tc the door and I stepped out behind the corner right in her face and——.

Q. Say that again. Let me——.

A. Standing right at the corner.

Q. You were standing at the corner of the house?

A. Yes, where she goes into the door, and she comes up to the door and I just steps around the corner and right into her face.

[949]

Q. I won't write none of this down. I can remember. I don't want nothing on paper.

A. And you will find that out. And she said ——.

Q. Tell me something. She lunged. What did she do? When she walked up the walk what exactly did she do?

A. She walked up to the walk and go up to the door and she took her keys out and I don't believe she had her keys already out and started to reach for the door when I stepped around the corner. And when I stepped around the corner she seen the gun handle sticking out and she reached and grabbed it.

Q. Where was the gun actually at, Jack?

A. Right in my belt.

Q. Right in your belt?

A. Yes.

Q. Then she made——. Go ahead.

A. She made a lunge for it and got it, see.

Q. Did she get it out of your belt?

A. Yes, she got it plumb out. That's what I was wrestling for, was the gun.

Q. For God sake.

A. But I ain't going to ever——.

Q. Then what happened after she grabbed the gun out of your belt?

A. When she grabbed the gun out of my belt I grabbed for it, see, and got a hold of the gun, and I bent it back, bent her arm back.

Q. Towards her again?

A. Yes. And it went off three times.

Q. Three times?

A. Three times. And then when I pushed her by the shoulder her arm come around, and I guess when I pushed her I pulled that son-of-a- [950]
bitch off two more times.

Q. In other words, you had the gun in your hand then?

A. Yes.

Q. Well, I'll be darned. And then it went off twice more. Five times. Then she feel (sic) right there, disn't (sic) she. That's too bad because I am going to have to write this up and send it in to the company.

A. That's the way it happened so I can't do nothing about it.

Q. There is one point I should put in there too. Jack, what did you have the gun for in the first place?

A. Well, I didn't have it. I went over there, see. I didn't have it when I first went over there. And so—I went back and got it and put it in my belt.

Q. Where did you find the gun. Where was the gun?

A. The gun that I had?

Q. Yes, the gun that you had in your belt. Did you bring the gun over with you?

A. Yes.

Q. Well, you had it with you all that evening and you brought the gun over?

A. Yes.

Q. And had it in your belt and you waited——. What did you have the gun in your belt for?

A. Well——.

Q. For what purpose?

A. I thought maybe—. I went over there and I said well, she comes in with somebody, see——.

Q. She was running around with fellows?

A. Yes.

Q. Oh, I see. God Almighty, that would make a guy feel sort of bad.

[951]

A. Uh-huh.

Q. Did you just plan on scaring her or scaring him?

A. Yes, just scaring him. But I didn't intend to kill her at all, not at all.

Q. That was about what time?

A. That was—. I went over there—. She wasn't there, see, and she was still gone.

Q. That's 2:00 a.m. in the morning she had not arrived home yet and you waited for her behind the house?

A. At the corner of the house.

Q. And you had the gun in your belt. Did you make an attempt to pull the gun or anything?

A. No, sir. When I seen nobody but her I didn't make no effort whatever.

Q. She seen the gun?

A. She seen the gun.

Q. Then what happened?

A. She grabbed it, lunged right on to it. That's all I could do. I didn't know anything else to do.

Q. I'll be damned. Then you tried to get the gun away from her?

A. Uh-huh.

Q. That's when it happened. I think I got it pretty straight. Whose gun was it? Was it registered in your name?

A. No, wasn't.

Q. It wasn't even registered? Where did you buy it?

A. Bought it from a boy over in Honcut a little over a year ago.

Q. What was his name?

A. G. W. something. I forget his last name. [952]

Q. G. W.? And he lives on Honcut road or right in Honcut?

A. Right in Honcut.

Q. Boy, oh boy. You got your cigarettes? I got to write this up to the company. We got to think of the children. I want this information. In other words, I mean just what you told me here now, let me see if it is exactly the way. You were supposed to go to a dance at 8:00 o'clock at Robinson's Corner?

A. Yes.

Q. Is that right?

A. Yes.

Q. All right. And you had other business to attend to?

A. Yes.

Q. What type of business?

A. I was up here—. I come down to the insurance office there, and about that time then I went back out and there was some people wanting to rent the house and I went around and seen about this goddamn furniture and stuff and I got back and I went over and eat supper with the old man over there, Thomas, and, hell, it was 9:30 before even——.

Q. 9:30 at night? Then you went back to Palermo?

A. Yes, I went—I was in Palermo then.

Q. I see.

A. And I said, 'Well, I am too goddamned late now.' So I goes down to the Dog House and tells the man about the refrigerator.

Q. The Dog House?

A. Yes, Glenn Hubbard.

Q. Glenn Hubbard?

A. Yes. Then he goes on down—. No. I picks [953]
up two boys there and wanted me to take them out to the house, so I took them out to the house. And they wanted me to bring them back up there at the Little Shamrock down there so I brought them back down there in front of the Little Shamrock where I had a flat tire and——.

Q. Where did you pick the gun up?

A. I had the gun in the glove compartment.

Q. You had the gun in the glove compartment?

A. Yes.

Q. I see. And then what time did you go out to Gridley?

A. Oh, somewheres around 2:00 o'clock.

Q. Then you were with these fellows up to that time, the flat tire. How long did you wait for her?

A. Oh, about 25 minutes.

Q. 25 minutes. About 2:20 you told me.

A. Uh-huh.

Q. So she got out of her car and she walked up the walk and she was by herself?

A. Yes.

Q. I see. One hundred per cent as far as the policy, I am almost positive. Like all policies, they have to be underwritten by the company. And due to the fact, you see, there was no physical—. Remember I mentioned about the physical? There was no physical. And I got to write all of this to the company and let them know just exactly what happened. So let me get it straight now. She got out of the car?

A. She pulled into the carport there and then she walked back around the car into the—up to the front of the house to the door. And when she come up to the door I was standing at the corner of the house. Well, I just stepped right [954] around the corner right into the door, see.

Q. Right in front of her?

A. Uh-huh.

Q. Now, did you have the—. How was the gun——.

A. It was sticking down this way like that.

Q. Right inside of your belt?

A. In behind my belt. My shirt was out.

Q. I see. And she could see it. In other words, the shirt wasn't over it? You had your shirt tucked in?

A. Yes.

Q. So she saw the gun?

A. Uh-huh.

Q. Then what happened?

A. Well, she grabbed for it and she got the handle of it and pulled her out, and when she did that I reached and grabbed with both hands, see.

Q. You grabbed the gun with both hands?

A. Both hands, yes. And somehow or another we knocked it off, see. I don't know how we done it, but anyhow it happened. I don't know.

Q. Where did the shells hit?

A. I don't know where she hit. I really don't even—. In this area somewheres.

Q. And then what happened after the gun went off three times?

A. Well, when it went off three times she finally—and she turned loose of the gun and I pushed her that way and she fell.

Q. And then you had the gun in your hand?

A. And the gun went off two times more.

Q. Two times more. What did you do after that?

A. I went and got in the car and drove back over here.

Q. Where did you park the car?

A. Right at the house.

[955]

Q. Right at the house?

A. Right beside the house.

Q. God Almighty.

A. I guess you can go down and get the car released, That's as near as I can tell you.

Q. Then you went home?

A. Yes.

Q. What time did you get home about?

A. Oh, I would say about somewheres around 3:00 o'clock.

Q. What's this I heard about the—. I mean, we have to send in the whole headline. They say

that they found a gun in your back yard buried. Did you bury it back there?

A. Yes.

Q. You buried it back there?

A. Yes.

Q. What did you do with the holster?

A. Put it in the garbage can.

Q. You put it in the garbage can?

A. The holster, yes.

Q. I guess you were scared?

A. That's right. Damn sure was scared.

Q. I'll bet you were Jack. What time did the police arrest you?

A. 4:00 o'clock.

Q. 4:00 o'clock. About an hour after you got home. Did you go home and just bury the gun right away? I know I read that in the paper about where they got the gun buried in the back yard.

A. How was the write-up? Pretty bad?

Q. Not too good. Did you see it?

A. No.

Q. Keep you pretty well occupied. Keep you pretty well isolated?

A. Yes.

Q. Well, it is a serious offense. There is no doubt about that, very serious.

A. Yes.

[956]

Q. I want to keep this in the files here.

A. Yes.

Q. Well, that's about all I can do, Jack. When you get your attorney—. I don't know who your attorney is. What was that fellow's name?

A. I was trying to get Madino Cardo (?).

Q. Madino Cardo?

A. Yes.

Q. San Jose?

A. Yes.

Q. There is nothing we can do. About all we can do is put your request to the company regarding your child. And that is Brenda?

A. Gay.

Q. Brenda Gay?

A. Yes.

Q. And she was born in Redding. What year was she born in Redding?

A. I think in '53 or '54. I don't know just exactly.

Q. How long have you known Marcella?

A. Ever since '53.

Q. Ever since '53. I'll be darned. Well, that's about all I can do, Jack.

A. Yes. The kids, they done told them, the girls?

Q. Yes. Well, boy, I don't know what to say, Jack.

A. I don't either."

Mr. King: Wait a minute. Is there something else there?

Mr. Grinnell: No. It just goes on to the other tape.

Mr. Mulkey: Do you want to hear it?

Mr. King: Did it say "the other tape" just then?

Mr. Mulkey: No, it didn't say "the other tape". Do you want to hear it? You heard it once.

[957]

(Thereupon the tape recording was turned on.)

Mr. King: There is a conversation there I can't make out, Your Honor.

Mr. Mulkey: Can't your client tell you?

Mr. King: I think that is unfortunate and unfair to say that remark.

Mr. Grinnell: That's Mr. Lazier talking about the front porch.

The Court: There is no need to go further with it.

Mr. Grinnell: Do you still raise your objection about the machine being cut off and on? Because I think it is apparent from listening to it that it wasn't.

Mr. King: If the Court please, on that point, as Your Honor could take judicial notice, these tapes can be cut, can be——.

Mr. Mulkey: Just a moment.

Mr. King: Let me finish. You can have the right to——.

Mr. Mulkey: You are not raising a valid objection. Anything like that has got to come in by proof, not by your statement.

Mr. King: May I finish and then you have a right to talk?

The Court: Let Mr. King make his objection.

Mr. Mulkey: All right.

[958]

Mr. King: As Your Honor knows, these tapes can be turned on and off and they do not show any pause in the tapes themselves. There is a button on the top of the machine that is being used right now by counsel that starts and stops the tape, and there is no indication whatsoever what may have gone on while the machine was stopped. Now, in that regard, if Your Honor will look at page 43, of what part of the transcription of the tape recording was made and handed to me, you will see, for instance, that the

conversation starts off with, "Q. What color house does he have?

A. He has got just a little old cabin.

Q. Is he married?

A. Yes."

Now, very obviously there was a conversation that went on ahead of whatever was said here. There is no doubt, if Your Honor will read those first paragraphs particularly, that you will see that there was a conversation had either immediately before the tape recording was turned on or at some earlier time. It does not appear here when the conversation first started. Let me go further, if the Court please. Your Honor has heard the tape recording and, as Your Honor knows, there are places in the tape recording where the voices of the people are inaudible, there are statements made that can not be made out, at least by my ears. I couldn't make out what was said and I am sure the court reporter will have several places in his tape where he did not get the conversation as it was recorded because it was inaudible. And I feel that it would be extremely prejudicial to the defendant's case to permit this tape recording in the condi-

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tion that it is in.

Mr. Mulkey: Just a moment, Your Honor. May I answer those objections very quickly. The party to that conversation, Mr. Travers, will be in this Court and on this witness stand to explain anything that defense counsel wants to ask him. He was there during the whole thing. He will explain anything that went on. The defense counsel——.

Mr. King: The best evidence rule provides that he should be put on the stand and qualified and testify. The words should come from the witness' mouth, not from a tape recording that can't be made out here.

Mr. Mulkey: I am not too familiar with the—.

Mr. King: I object on the ground it isn't the best evidence.

Mr. Mulkey: Are you the only one that talks in this courtroom, Mr. King?

The Court: Just a minute, Gentlemen.

Mr. King: —would be out of the lips of the witness himself.

The Court: Well, as far as the tape goes and the shape that it is in and so forth it does have its shortcomings. But those are apparent. If you think there is something there that should be developed, Mr. King, you will have the opportunity to do it on cross examination. So the objection on that ground is overruled: I am a little uncertain about the best evidence rule there as applied to tapes.

[960]

Mr. Grinnell: Well, the best evidence rule, Your Honor, usually refers to written documents. If you draw an analogy between that and this situation I am sure that the best evidence rule is usually referred to when you are trying to introduce a copy of a document rather than the original document itself. Here we are attempting to introduce the original conversation rather than have the witness come on and attempt to inform the jury what he recalls of it a month of (sic) so later. So with that analogy it would be entirely consistent with the best evidence rule to

have the actual voices made at the time rather than have the witness come in and say what he thinks it was a month later.

Mr. Mulkey: I think this is the best evidence, Your Honor.

Mr. King: May I address the Court please.

The Court: If you wait just a minute and let me read this. I don't think the best evidence rule has any application here. Do you have any further objection?

Mr. King: If the Court please, I would like to address myself to the Court on the proposition that as Your Honor was reading the transcribed statement Your Honor will recall that in several instances in the transcribed statement the words as Your Honor heard them from the tape recorder were not the same as in the transcribed statement handed me; that there were numerous places in the record where the conversation was inaudible. Now, further, I want to call Your Honor's attention to this matter: I believe that [961]
if this tape recording is going to be introduced in evidence, as Your Honor has indicated that he may permit its introduction, that I be permitted to make my objection each and every—to each and every one of the matters discussed in the record so that I can have a basis for proper record if it is necessary for this case to go on appeal.

Mr. Grinnell: That is what you are doing right now.

Mr. King: I understand the law to be, if the Court please—and I spent considerable time going over the law—that I am permitted under the procedure to go

through this transcript that I have here in my hand and interpose objections to each and every question that was asked by the insurance agent and answered by the defendant. And I wish to be permitted for the purpose of protecting the record to do that very thing.

Mr. Mulkey: Well, now, if the Court please, I don't think this is proper, but if it is, if there are going to be objections while this tape is being played, that is all right with me. But as soon as it is finished and the objections are through I am going to play it through again in total without objections.

Mr. King: That wasn't my point at all. You miss my point.

Mr. Grinnell: Why don't you make your objections now so the objectionable part of the tape you have the Court rule one it if there are objectionable parts. If it is sustained, we will then omit those when [962]
it is played by merely passing over them.

The Court: If you will give me an opportunity to rule on that, Mr. Grinnell, that is going to be the ruling of the Court. If you have objections as to relevancy, materiality or other objections to any portion of the tape that was played and has been transcribed you will make your objections at this time.

* * * * * * *

[963]

The Court: We will take a five minute recess and then resume our session in Chambers for the purpose of hearing objections.

(Thereupon a brief recess was taken.)

[964]

Mr. King: May I say this before Your Honor rules, the Court Reporter has indicated to me that their record as it will come out of their office from the transcription of the tape recording just now made here before Your Honor, that the inaudible portions of that tape recording will not show on his record, that there will be no marking whatever of any inaudible portion that he can not understand and take down. Now the purpose of my questioning the Court Reporter would be to establish the fact that the record on appeal of this case will not show any inaudible parts of the tape recording itself, but will on the contrary be a running account, that will not be a true account of what occurred here.

The Court: You are in error on that point, Mr. King, the tape will have to be admitted in evidence and it can be replayed at any time and anybody can hear what points or what portions are inaudible, what are hard to understand, and it will always be a part of the record and it will be a better part of the record than what the Court Reporter might have in his notes, so the tape will have to be admitted in evidence if it is purposed to be used.

Mr. Grinnell: Yes, Your Honor.

The Court: Now I followed the tape and the transcript and the discrepencies were minor or negligible. There were a few words dropped or sounds that were not reproduced in the transcript but they have no significance and no importance whatsoever. Now if you have objections to the—any portions of the tape, [965]

they should be made at this time.

Mr. King: Very well, starting on line 3, if the Court please, page 43 of the transcript of the tape recording heretofore handed me.

The Court: I believe, Mr. King, that it starts on line 17, is that not right? It was rerun, that was rerun, 3 to 15 is incorporated——

Mr. Mulkey: (Int.) That is correct, Your Honor.

Mr. King: That is not my understanding, Your Honor, my understanding, since I was present at the time I should know about that. The reporter at line 15 started in and ran the tape recording starting from the beginning, "What color house does he have" and ran it on down through,—the start of the conversation of the tape started in with, "What color house does he have"—no, it started with an answer, "Down there on the left in the 'Y' " line 17.

The Court: The transcript is clear, Mr. King, it says the tape was rerun again from the beginning and it starts on line 17.

Mr. King: Of course, I was present and heard the entire tape when this transcription was made and I saw the reporter start the tape all over again and he did start it, that particular tape, and it started off, "What color house does he have" and that indicates that there was a previous conversation with this insurance agent about this case that is not laid down here on this transcription; and that goes to one of my objections in this case, that he didn't get all the

[966]

conversation.

Mr. Mulkey: That objection has been made and overruled, counsel.

Mr. Grinnell: All of the conversation regarding the shooting in Gridley is in this tape and that would be the testimony of Mr. Travers.

The Court: The objection is overruled.

Mr. Grinnell: However, I would be very happy to omit that portion of the tape regarding the color of the house and start where he starts telling where she came home, if that is agreeable with you, we don't want to unduly burden the record with all the other, we would just as soon start where he actually starts testifying about the killing.

Mr. Mulkey: Is that agreeable with you, counsel?

Mr. King: No.

The Court: The tape will be heard in its entirety, the way I heard it.

Mr. Grinnell: All right, Your Honor.

The Court: And that starts at line 17, page 43 of the transcript.

Mr. King: As long as we are forced to start there, when it is played to the jury the first question on line 17, "Down there on the left of the 'Y'. You know where the Pickerings live" and the further question, "Yes, next to the Pickerings. Ans. Right across in front of them". I object to that question on the ground it is incompetent, irrelevant and immaterial. There is nothing in this record to indicate anything

[967]

at all about the Pickerings. I feel it would inject something false into the minds of the jurors and on the ground of immateriality it should not be included.

Mr. Grinnell: That is not objection, Your Honor.

The Court: Except this, there are portions of it

that, strictly speaking, are not important and are not relevant, however, as part of the entire statement and just to get away from that fact of appearing to break up the tape and play just portions of it, the Court is going to overrule the objection and rule that the portion mentioned should be played. In other words it may be immaterial but it is not prejudicial.

Mr. Mulkey: May I ask one thing, at least it appears somewhat evident to me at this point of counsel's position in this affair, I may be wrong in my assumption but I sort of feel the indication we are going to pick one statement here and one a little later to make it almost impossible to replay the tape leaving out the immaterial parts and I think for the protection of the record if counsel would make all of his objections so that the Court would know if that is what he is trying to do, then the Court would have ample grounds to overrule counsel's objections.

The Court: Let Mr. King proceed in his own fashion, he has a right to present his objections.

Mr. Mulkey: I think it is just a try to place error in the record is all.

[968]

Mr. King: That is not true at all and I feel I have a proper right to object when I see fit without counsel bickering with me about my objection.

The Court: You will be given full opportunity, Mr. King.

Mr. King: Starting on line 21, going through line 28, I object to the question, "What color house does he have? Ans. He has just got a little old two-room cabin. Ques. Is he married? Ans. Yes. Ques. What is

s wife's name? Ans. Rosey. Ques. I see no reason
ay the Court wouldn't give it to him. I'll be darn.
ns. I see her sister down here trying to do something
out it. Ques. Who is that? Ans. Her sister." Now
ne 29. "Ques. Oh, wonderful, what is her sister's
ame? Ans. Helen." Now I feel that that is incompe-
nt, irrelevant and immaterial, that it is irrelevant
ecause we have never at any time connected up any
ster by the name of Helen in this record. I don't
now from my reading of the transcript what they
ere talking about nor do I feel it can be explained
nd therefore it would be incompetent as well as ir-
elevant.

The Court: It is the Court's conclusion there is
othing that has to be explained about it, that it is
ot prejudicial and therefore it can be played as part
f the tape.

Mr. King: Line 29, "Ques. Oh, wonderful. What is
er sister's name? Ans. Helen. Ques. That is Marcella?
Ans. Yes. Ques. And her last name is what? Ans. I
forgot what her last name is. Anyhow she didn't want
to have the kids with them down there or no say-so
over there. I was suppose to have the say-so over
[969]
the money". I object if the Court please, to the ques-
tions and answers last read on the ground they are
incompetent, irrelevant and immaterial, that there is
no proper foundation laid about, "money" in this
case, that it would be prejudicial to the defendant to
have the matter of money brought in at this time.

The Court: There appears to be nothing preju-
dicial about the statement. The objection will be over-
ruled.

Mr. King: Then starting on line 3, page 44 of my transcript, "Ques. Of the life insurance? Ans. Yes." I object on the ground that that is incompetent, irrelevant and immaterial, that it is highly prejudicial to the defendant's rights, that there has been nothing mentioned in this entire trial about life insurance or who the policy might have been made out to or whose life was covered with the life insurance, that it injects into the case an element that would be difficult for the defendant to answer, that it might give the jury some idea that——

Mr. Mulkey: (Int.) Perhaps——

Mr. King: (Int.) Just a moment, Mr. Mulkey, let me finish and then you can talk.

Mr. Mulkey: I doubt it.

Mr. King: Give the jury some idea of some motive on the part of the defendant which does not appear in this case.

Mr. Mulkey: If the Court please, I will be happy if there is any question about that. It is my understanding that the question referred to is insurance on the life of the deceased, payable to her children, and [970]
I am sure the insurance agent will be amply able to explain that to the jury.

The Court: This goes to the purposes of the conversation.

Mr. Mulkey: That is right.

The Court: Between the witness and the defendant?

Mr. Mulkey: That is right.

The Court: The objection will be overruled.

Mr. King: Your Honor, I have a call from my wife about arranging witnesses, may I be excused?

(At this time a short recess was had, after which the following proceedings were then had):

Mr. King: May Your Honor rule that the objections that I interposed—perhaps this will expedite the matter—will Your Honor rule that when the questions are read and the answers are read if I say the previous objection, that it will incorporate my objection on the grounds it is incompetent, irrelevant and immaterial and then I will not have to repeat that each time that I raise the point on these questions.

Mr. Grinnell: Just say the same objection.

The Court: It will be so understood.

Mr. King: On line 4, page 44, "That's still in the underwriting department, Jack, that money, and you have the binder. Now, you have got the binder that was given Marcella. Ans. No, she had it in her billfold. Ques. But it is in her personal effects now? Ans. Yes. Ques. Fine. Ans. You will have to go over to the morgue. Ques. I can get that over at Gridley. Ans. [971] Yes. And they can't touch it". Now my general objection that, I understand that my general objection that I have heretofore made goes to this statement I have last read to Your Honor.

The Court: The objection is overruled.

Mr. King: And I also at this time will move to strike the testimony that I have read to this point.

The Court: The motion is denied.

Mr. King: Line 18, page 44, "Ques.—" line 11, "I got the Sheriff's office—been very nice. They are going

to have photostatic copies made of the marriage license. That is very important, Jack, that you were married. Ans. Yes. Ques. It is a terrible thing, isn't it? Ans. Yes. She lied about it all the way around. Ques. Terrible thing. Ans. Yes, she thought we wasn't married". Your Honor, I object on the previous grounds as though they were fully set forth at this time and further call Your Honor's attention to the fact that the replaying of the tape recording shows that the word "They" instead of, "She" in the answer is the correct word, " 'That they thought' we wasn't married", was the correct answer as came out of the tape recording.

The Court: Well, the jury is going to hear the tape and not the transcript so the objection is overruled.

Mr. King: And the same objection to the next question on line 18, "She thought you weren't married. Ans. Yes. What I can't understand is what the hell she told Goldfine about it. Ques. I don't know. [972] Darnest thing I ever heard. Can't understand it. Ans. At the Welfare Department she told them she wasn't married. Ques. I'll be darned. Ans. Yes, sir." I object on the same grounds, if the Court please, to those statements, particularly that they are, I don't mean irrelevant, but immaterial.

The Court: They are incidental to the conversation and can not be deleted from the tape without destroying its usefulness. The objection is overruled.

Mr. King: Q. Line 20, "I don't know. Darnest thing I ever heard. Can't understand it. Ans. At the

Welfare Department she told them she wasn't married." My usual objections, and that the answer be stricken as not responsive to the question.

The Court: The objection is overruled and the motion is denied.

Mr. King: "Ques. I'll be darned. Ans. Yes, sir. Ques. Can't understand it. Goofiest thing. This is really something. See, we are interested to really how the darn—I mean, how it come about, you know, like you were telling me this morning, and I have got to write a letter to that—— Ans. I tell you what to do. I want you to go over there where she lives, see". Now if the Court please, I interpose my objections to that statement under my general objections and also that the conversation that they had in the morning is not a part of this record and it is very evident from that statement that there was a conversation had in [973] the morning with this same insurance agent by the defendant which isn't produced here.

The Court: There is nothing prejudicial about the fact they may have had other conversations. The objection is overruled.

Mr. King: "In Gridley. Ans. Yes"—that is starting on line 29, page 44—"And go to the corner of the house there right next to the front door. And she was standing" there are three dots or dashes in my transcript and it starts again, "She come right up to the door and I stepped out behind the corner right in her face and" and there are several more dashes indicating from what I heard on the tape recording that there was considerable inaudible conversation had

where the dashes occurred, there were quite a number of sentences there, words made by the defendant at that time, if my memory serves me correctly, on the tape recording, that may have been very material to this case and those inaudible statements are not truly transcribed here on this record, or in the record that was taken here this morning. For that reason I object to the statement going to the jury on the ground it is incompetent, irrelevant and immaterial, and that first, on its inaudibility, and primarily on that ground.

The Court: Mr. King, this statement is not going to the jury. The tape is going to be played to them and the fact that there may be words or even phrases that are inaudible or which are not understandable, does not disqualify the tape.

[974]

Mr. King: Starting on page 45, line 1. "Say that again. Let me"—and then there is four dashes. "Ans. Standing right at the corner". May I again call Your Honor's attention to the fact that there was considerable, that there was a considerable statement right at that point in the tape recording that was inaudible, that hasn't been transcribed, that will not be able to be understood by the jury and that it is very material to the defendant's case just where he was standing when he first saw the decedent and that it would be highly improper to introduce that statement for whatever it is worth when it might have some very definite significance in the trial of this cause. I object on that ground.

The Court: There can hardly be any better proof, Mr. King, of what the defendant said than the tape, as his actual statements. If he said something of consequences that was not picked up on the tape, why Mr. Travers will be there and you will be entitled to cross-examine him. There doesn't appear to me there is any such thing at that point. The objection is overruled.

Mr. King: Going on, Your Honor, line 3, "Ques. You were standing at the corner of the house? Ans. Yes, where she goes into the door, and she comes up to the door and I just stepped around the corner and right into her face". I object on the general ground I have heretofore made to the previous questions in this transcript and on the further ground that the nature of the statement shows that it is not an admission but a confession and that the rules concern-

[975]

ing confessions be applied, that there is no proper foundation laid, that there is nothing to show that this statement was given freely and voluntarily.

Mr. Grinnell: Of course if that foundation isn't laid when Mr. Travers is on the stand, the tape of course won't be admitted.

Mr. Mulkey: Did Mr. King say that was a confession of murder. Do I understand you correctly, counsel?

Mr. King: It might be construed as such.

Mr. Mulkey: Do you construe it as such?

Mr. King: That I am not prepared to answer at this time.

Mr. Mulkey: You are making your objection on that ground, I would like to know, do you construe it to be a confession or not?

Mr. King: I will leave it up to the Court.

The Court: The objection is overruled.

Mr. King: Question, line 6, "I won't write none of this down. I can remember. I don't want nothing on paper. Ans. And you will find that out. And she said"—and then there are several dashes on the transcript copy that I have in my hand which shows that the remainder of the conversation had at that time with the decedent is inaudible and that that particular conversation had at the time with the decedent is very material to the issues in this case and it would be extremely misleading to the jury not to be able to find out at this stage of the proceedings what was [976] said by the decedent. As Your Honor will remember there was quite a garbled dissertation had on the record, on the tape, which was not audible and it is very material to the case, to the defendant's side of the case at least, that what was said at that moment is very important and for that reason I raise my general objection to the question and request that the—since it isn't audible that the remainder of the question and answer be stricken.

The Court: The objection is overruled.

Mr. King: Now starting on line 9, "Ques. Tell me something. She lunges. What did she do", the answer appears after a replay, a repeating of the record on line 21, "You will find that out. She said", and then again there is an inaudible part of the rec-

ord which was not taken down by the reporter at the time when he made the record I have before me; and it is extremely important that the conversation of the decedent be transcribed, if it is to be introduced to the jury, that the inaudibility prejudices the defendant's case and for that reason the question and answer should be stricken.

The Court: The objection is overruled.

Mr. King: "Ques. Tell me something"—line 22—"She lunged. What did she do? When she walked up the walk what exactly did she do? Ans. She walked up to the walk and go up to the door and she took her keys out and I don't believe she had her keys already out and started to reach for the door when I stepped around the corner. And when I stepped around the corner she seen the gun handle sticking out and she [977] reached and grabbed it". Now I object on my previous grounds and further that this statement is in the nature of a confession and that there is nothing to show in this record at this time that the confession was free and voluntary.

The Court: The objection is overruled.

Mr. King: Question on line 29, "Where was the gun actually at, Jack? Ans. Right in my belt. Ques. Right in your belt? Ans. Yes." Now I move that on my general objection, that it is incompetent, irrelevant and immaterial, that it is a—it goes further than an admission and is in the form of a confession and there is nothing to show it was freely and voluntarily given.

Mr. Mulkey: You say it does then amount to a confession in your estimation, Mr. King?

Mr. King: Line 32, "Then she made"—and there are several dashes in my transcript which show that the rest of the question was inaudible, and if my memory serves me the record played to Your Honor was inaudible at that point to some extent and then the question goes on, "Go ahead. Ans. She made a lunge for it and got it, see. Ques. Did she get it out of your belt? Ans. Yes, she got it plum out. That's what I was wrestling for, was the gun. Ques. For God's sake".—— And then my objection heretofore made—there was an answer came in there, "Ans. But I" and then there are several dashes showing the Court Reporter did not hear the inaudible conversation that was had on the tape recording. Now I move, [978] I object to that on my general grounds both to the questions heretofore read and the answers thereto and on the ground that they are not only incompetent, irrelevant and immaterial but they are highly prejudicial to the defendant.

The Court: The objection is overruled.

Mr. King: I move at this time to strike the same.

The Court: The motion is denied.

Mr. King: Now evidently the Court Reporter in this transcript had some difficulty, he repeated four times, the tape, to try to ascertain the inaudible portions and it is at this point where most of the inaudible portions occur. There is considerable tape that runs at this point of the statement that only a word now and then can be distinguished and the Court Reporter got down question, "For God's sake" and then an answer, "But I" and then he got down,

"But I ain't going" and then, "Wrestling for, is the gun. But I ain't going to" and then a lot more inaudible conversation and then there was an answer, "But I ain't going to ever" and then a lot more inaudible part of the conversation and I object to the introduction of those statements to the jury as incompetent, irrelevant and immaterial, highly prejudicial to the defendant's case, that they would serve only one purpose and that would be to confuse the jury and to let them substitute in the inaudible part of the record anything that they might want to hear, from something that can't be made out by at least the Court Reporter and those people who heard it here [979] today. I move that further that that part of the conversation——

Mr. Mulkey: (Int.) Mr. King does not speak for the District Attorney's office, that that be stricken from the record.

The Court: This transcript is not going to be presented to the jury and the tape speaks for itself and I assume if a juror doesn't hear something why he knows he hasn't heard something, so the objection is overruled and the motion is denied.

Mr. King: Question, line 15, "Then what happened after she grabbed the gun out of your belt? Ans. When she grabbed the gun out of my belt I grabbed for it, see, and got ahold of the gun, and I bent it back, bent her arm back." I again renew my objection and ask that the question and answer be stricken and not played to the jury, as a declaration made in the nature of a confession, there is no foun-

dation laid, that it would be extremely prejudicial to the defendant's case if this tape recording with that statement in it was played to the jury.

The Court: The objection is overruled.

Mr. King: Question, "Towards"—line 18, "Towards her again. Ans. Yes. And it went off three times. Ques. Three times? Ans. Three times. And then when I pushed her by the shoulder her arm came around and I guess when I pushed her I pulled that son-of-a-bitch two more times". Now my general objection that I have heretofore made, to that please, Your Honor, Also on the further ground that it is going further than an admission in that it is a con-
[980]
fession, that it was not freely and voluntarily given, in contravention to the law in this case. I move it be stricken from the record and not played in the record to the jury.

The Court: The point that it is a confession is the first time that has come up notoriously.

Mr. Mulkey: I have asked Mr. King——

Mr. King: (Int.) Would you let His Honor finish so that I can hear what His Honor has to say?

Mr. Grinnell: The only difference I believe, would be in the foundation that has to be laid, I will just ask the gentleman if he made any threats to the man or any promises of immunity, if he did not, the statement was voluntary.

The Court: It may approach the point of a confession.

Mr. Mulkey: I understand Mr. King believes it to be such and we will lay that foundation as long as

that is Mr. King's position, that is your position, is it not, Mr. King?

Mr. King: I don't like to be harassed if the Court please, by Mr. Mulkey, if he has anything to direct to me, would he please direct it through the Court?

Mr. Mulkey: Yes, I would like to know if you are making the objection on the ground it is a confession or not.

The Court: He has the right to make the objection and he has made it, Mr. Mulkey.

Mr. Mulkey: Fine, that is all I wanted to know.

The Court: And the Court feels there may be some basis for it and this may approach the nature of a [981]
confession and that therefore before the tape is used I think that the same foundation should be laid as is used for the introduction of a confession.

Mr. Grinnell: We will, Your Honor.

The Court: So that the objection is overruled.

Mr. King: Line 23, question, "In other words you had the gun in your hand then? Ans. Yes. Ques. Well, I'll be darned". Now I object to that on the grounds heretofore mentioned and on the further grounds it is in the nature of a confession and that it was not freely and voluntarily given, and that statement coupled with other statements in this record would amount to a confession and for that reason I move that it be stricken and not played to the jury.

The Court: The objection is overruled and the motion denied.

Mr. King: May I interpose an objecton to, further, on line 28 where the word, "Son-of-a-bitch" is

used, would your Honor consider that in ruling on the previous objection heretofore made, that the language is offensive to the senses, that it puts the defendant in a bad light, that he has not nor does he intend to use that type of language before the jury. That it brings into the case an element of rowdyism or something of that sort that shouldn't be before the jury, that this was a private conversation between him and an insurance broker, that he did not know that it was being transcribed and it would very seriously prejudice the defendant's case if those words were used before the jury.

[982]

The Court: The objection is overruled.

Mr. King: Question, line 32, page 46, question, "Three times. Ans. Three times. And then when I pushed her by the shoulder her arm came around and I guess when I pushed her I pulled that son-of-a-bitch about two more times". I object to that if the Court please, and move it be stricken on the previous grounds set forth and in particular on the ground of the offensive language used, which would cause the jury to feel that this defendant is of a rough or uncouth character that would use language of that sort before the jury.

The Court: The objection is overruled.

Mr. King: Question on line 3, "In other words, you had the gun in your hand then? Ans. Yes." The other objections, if you please, will be taken to this question and answer and I ask that it be stricken and in particular on the ground that it is a confession and no proper foundation has been laid and there is

nothing to show that it was free and voluntarily given.

The Court: The objection is overruled and the motion denied.

Mr. King: Question, line 5, "Well, I'll be darned. And then it went off twice more. Five times. Then she fell right there, didn't she? That's too bad because I am going to have to write this up and send it in to the company. Ans. That's the way it happened, so I can't do nothing about it." Now my previous objections to that, if the Court please, and further that the

[983]

statement by the insurance broker, and all through this transcript I have seen indications of the statement that he intended something of value to go to the defendant if he did give him a statement, even though he said that he would not write it up, he promised something in the way of immunity at this point and there was a consideration moving from the accused to the insurance agent when he made the statement. I felt, if the Court please, as is clearly indicated from the entire transcript which Your Honor heard and read, that the insurance broker was in there for the purpose of getting a secret statement from the accused. Now he did not divulge to the accused that it was being taken down, and it is very apparent from this transcript, from the way the questions were asked that the agent did know that it was being taken down by the tape recording, and that the defendant did not know and he felt that he was doing something that he had to do, to wit, make a declaration to an insurance broker concerning an insurance policy which the

broker or agent had sold him. I feel there was some promise implied at least of immunity at this point.

Mr. Mulkey: Of immunity from what, Mr. King? I think it is a fair question, Your Honor, there are certain prerequisites with respect to any promise made and the objection as made now holds no ground at all. Promise of immunity from what, prosecution?

The Court: It doesn't appear from this tape and that is all I have before me, so the objection is overruled.

Mr. King: And my motion to strike?

The Court: Denied.

[984]

Mr. King: Line 10, "There is one point I should put in there too. Jack, what did you have the gun for in the first place? Ans. Well, I didn't have it. I went over there, see, I didn't have it when I first went over there. And so"—there are several dots indictating that the tape is inaudible at this point, and as I recall there were several sentences expressed on the tape that could not be made out. Going on, "I went back and got it and put it in my belt". I object first of all on the general grounds which I have heretofore specified and further I request that the question and answer be stricken and not played to the jury in the tape recording.

The Court: The objection is overruled and the motion is denied.

Mr. King: Question on line 15, going on, "Where did you find the gun? Where was the gun? Ans. The gun that I had? Ques. Yes, the gun that you had in your belt, did you bring the gun over with you?

Ans. Yes." Now I object on the grounds heretofore suggested, Your Honor, and move to have the question and answer stricken and on the further grounds that this is in the nature of a confession and not an admission and even though it were an admission, that it is highly prejudicial to the defendant's case and it should be stricken.

Mr. Grinnell: May I say something at this time? Instead of taking this transcript line by line, would it not be in order to have Mr. King make that objection to the entire tape, that it is in the nature of a confession and we can have a ruling on that at this [985]
time and then we will, as we have indicated earlier, lay the foundation for the introduction of a confession, whether it is so construed by the Court to be a confession or an admission.

The Court: I think we can save time on some of these points and I will do this, that it is the Court's conclusion that the tape recording in some portions where it gives statements made by the defendant, either approaches or actually constitutes a confession of some offense, and it is the Court's ruling that before the tape is used in its entirety, and I understand it is going to be used in its entirety.

Mr. Mulkey. Yes, Your Honor.

The Court: That a proper foundation will have to be laid.

Mr. Grinnell: Very well.

The Court: So any objections made on the ground that some of the answers or questions and answers amount to a confession are overruled. Now objections

that are made on the ground that parts of the tape are inaudible are overruled because it does not appear that anything that is difficult to hear is prejudicial to the defendant in this case, the thing that counsel has referred to as the transcript here, and the tape of course will speak for itself and——

Mr. Grinnell: (Int.) And if there is inaudible portions certainly Mr. King can go into that on cross-examination of Mr. Travers if he wishes.

[986]

The Court: And it is the Court's attitude or position if a juror does not hear anything he just doesn't hear anything and he certainly will not imagine something. There is a presumption of innocence that goes with the defendant in this case

Mr. King: At this point, Your Honor, may I suggest that it seems rather unusual that these omissions or inaudible portions of the tape recording occur at a time usually where the defendant is trying to answer the agent on very material points concerning the shooting.

Mr. Grinnell: On the other hand I think the tape indicates that all of the questions are directed to clarify the circumstances surrounding the shooting and to clear up any——

The Court: (Int.) I don't agree with Mr. King on that point, the points where the tape is difficult to hear or inaudible are of very little meaning or significance and the portions that are important are quite clear so any objection based on the fact that some of the portions or words are inaudible will be overruled.

Mr. King: Now do I understand that Your Honor wishes, does not wish me to go on at this time making my objections to the various questions and answers?

The Court: I don't want you to repeat, it will be unnecessary for you to repeat the objections that I have already ruled on.

Mr. Mulkey: As to audibility and confession.

The Court: Now the third objection I will rule on, that it is a fact there is in the tape and in the con-

[987]

versation contained in the tape some matters that are irrelevant and immaterial, but they are not prejudicial and to take them out would destroy the usefulness of the tape because we would have to be turning it on and turning it off and then the jury would get the wrong impression as to what is happening. The immaterial and irrelevant portions are not prejudicial to the defendant in any respect whatsoever so that the Court will not entertain an objection on that ground.

Mr. King: May it be considered, since Your Honor has gone over this transcript we are now talking about, which was a transcript of the recording heretofore heard by Your Honor, that my objection goes to each and every question that goes on in the tape here; and Your Honor's ruling would be the same on each and every objection, the same as if I had made those objections in full?

The Court: That is correct.

Mr. King: And that my motion to strike would be interposed to each and every question and answer if

we were to continue the proceedings as we have heretofore had it?

The Court: That is right and the motions are being denied.

Mr. King: Your Honor, for the edification of the Court at this time I wish to inform the Court I have spent considerable time reading cases involving tape recordings and if this tape is permitted in the record, I feel that it would be error of such character that [988] it would cause a reversal, if it results in a conviction of the defendant.

Mr. Grinnell: Do you have any case that you can cite where a tape was used that it was reversed on that ground——

Mr. King: (Int.) Just a moment, let me finish. That while the Courts have gone to some length to uphold tape recordings which were taken out of the presence of the accused, but that these tape recordings only were taken by officers and not by a person who is an intimate of the accused, and may the record show this person who is doing the questioning was an intimate and a long time acquaintance of the accused, he was in a relationship of insurance agent or broker and client and while I quite agree with your, Your Honor, there is no relationship of attorney and client or relationship of patient and doctor or priest and confessor, that this approaches a confidential communication between a man and his insurance broker, for a very definite purpose, and that to permit the children to receive money that might be due them. I do not feel, Your Honor, that the Supreme Court of this

State would go so far as to admit this declaration, this tape recording in the fashion that the District Attorney wishes to present it to the jury. I feel that it is gross error to admit the tape recording, that it will be highly prejudicial to the defendant and that it would serve no purpose other than to excite the prejudice and passion of the jury, to inflame them as against this defendant, and the evidence could be well brought before the jury without the tape recording, it could come out of the mouth of the agent and be [989]
produced in question and answer form before the jury. I feel very strongly on this point, Your Honor, and for that reason I made the statement I have just made.

The Court: The points may be argued in argument, argued as to the weight of the testimony, but they don't go to admissibility.

Mr. Mulkey: May I make one other statement that occurred in the beginning of this proceedings, so that I might forestall any undue delay before the jury. Mr. King made the statement about the attorney's room bugged or something of that kind, and I want at this time that Mr. King be admonished not to make statements of that kind before the jury because I am sure he has no proof of them and I don't think that is proper to put before a jury in a remark.

The Court: Of course it is not.

Mr. King: If the Court please, on that very point, I did not cross-examine Officer Spann, may I be permitted at the resumption of this trial to ask Officer Spann a very few questions?

Mr. Mulkey: You can call him as your witness any time you want.

Mr. King: On cross-examination he did make the declaration that the Court will recall that the defendant had no information concerning—rather that the Sheriff's office had no information concerning where the gun might have been.

Mr. Grinnell: That is right, and Your Honor will know when this tape is introduced that this conversation took place with this insurance man some two [990]
days after the gun was found and holster.

Mr. King: I will call to Your Honor's attention there was a previous conversation had with the insurance man that isn't before Your Honor and in transcript form.

Mr. Grinnell. But it was this morning, it was this morning of the tape.

Mr. Mulkey: I will be happy to say this for Mr. King's edification, I have spoken to Mr. Spann and I don't mind anybody knowing why the officers went out there to look for a gun, Mr. Lazier made the comment he thought Mr. Atchley was too tight to dispose of anything and consequently it would probably [be] at his premises and that is why they went out there.

Mr. King: Are you testifying, Mr. Mulkey?

Mr. Mulkey: No, Mr. King.

The Court: Let's see how we stand so far as the progress of the trial goes, you are going to present Mr. Travers after the noon recess?

Mr. King: May I call Mr. Spann for a few brief questions?

Mr. Mulkey: You can call him as your own witness, he has been dismissed some time ago.

Mr. King: I will call Your Honor's attention to the fact Mr. Spann is on duty in the Sheriff's office and when we resume at 1:30 he will be available.

The Court: If you have further cross examination and wish to examine him within matters that are [991]
within his direct examination now, I will give you the right to reopen cross examination.

Mr. King: Very well, Your Honor.

Mr. Mulkey: We do, however, have as our next witness Doctor Richardson, or the gentleman who gave this tape.

The Court: It will be up to the defendant to make arrangements for Mr. Spann.

Mr. King: It is understood I am calling him for further cross examination.

(At this time a short recess was had, after which the following proceedings were had in the Law Library, in the presence of the Court, attorneys for respective parties, Reporter and the Clerk:)

Mr. King: If the Court please, since we have been occupied here in the library, Mr. Mulkey for the people has suggested that he is in a big rush to have another witness called rather than to have Officer Spann called. Now I understood Your Honor's ruling that, as we walked out of chambers to be I could call Mr. Spann for a few questions right after the noon recess. Now I feel that this would be only proper and in the interest of justice that I be permitted to ask a few questions of Officer Spann on cross examination

since this other matter has come up and it would be extremely prejudicial to the defendant's case if I were not permitted to ask him before he put the insurance agent on the stand, and that is my position exactly, and as I understood Your Honor's ruling to [992] be in chambers I would be permitted to call Officer Spann for further cross examination at 1:30.

Mr. Mulkey: May I be heard? Officer Spann was not the last witness on the stand, there have been other witnesses who have interceded between he and the present status of the case so it couldn't have been very urgent for Mr. King to recall him. Secondly, we have made arrangements—the only reason why Mr. King at this time is appraised of this record is that it is in preparation for calling the gentleman who is the other party to this conversation, and I think it is the only orderly Court procedure that after hearing the record, which Mr. King had a record of a week before this trial——

The Court: (Int.) I understand that. We will proceed with the People's next witness and then following that if you want to examine Mr. Spann further, you may.

Mr. King: Then Your Honor has changed his ruling heretofore made, of my request to call Officer Spann for further cross examination. I do recall to Your Honor's attention the fact that there was only a brief witness intervening between Officer Spann and this stage of the proceedings and that witness was asked a very few questions.

Mr. Mulkey: Mr. Crayne, Mr. Gillick and Mr. Brown.

Mr. King: They were only very brief witnesses.

The Court: All right, it is going to be the order of the Court that we will proceed with the People's next witness who I understand is here with some [993]
difficulty due to illness in the family.

Mr. Grinnell: That is right, his son is being operated on today.

The Court: And then if the defendant wants to further cross examine Mr. Spann——

Mr. Grinnell: (Int.) As to matters covered on direct examination?

The Court: Naturally.

(At this time the noon recess was had:) [994]

(At this time a short recess was had, after which the following proceedings continued in chambers:)

Mr. King: Now if the Court please ——

The Court: (Int.) I need a transcript.

Mr. Grinnell: I am sorry, I picked it up, it commences on Page 43.

The Court: Yes.

Mr. King: If the Court please, in discussing this matter during this intermission with the Court Reporter who took down the transcription not only of the copy that I have but who took down the transcription of what he heard here just now as the tape recording was played, I became appraised that there were considerable portions on that tape recording which were not taken down and I at this time would like to interrogate the Court Reporter who is standing by, if Your Honor would permit me in order to make

a record in this matter to have him sworn and testify as to just how much of it he got down on his notes of the tape recording that he heard and how much it differs from the tape recording that he transcribed heretofore, a copy of which I have in my hand.

Mr. Mulkey: I object to any such proceedings, Mr. King heard this with his own ears at the same time the Court Reporter took it down. The Court Reporter makes his notes. What he hears or doesn't hear is evidence from his transcript thereof and any examination by Mr. King of the Court Reporter will prove of no value to this record in any way, shape or form.

[995]

THURSDAY, NOVEMBER 20, 1958
AFTERNOON SESSION, SEVENTH DAY

Court was called to order at 1:30 o'clock p.m.

* * *

The Court: Let the record show the jurors are seated and present. You may proceed.

Mr. Mulkey: I will call Mr. Travers.

*Ray J. Travers,* called as a witness by the People, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

*Direct examination*

By Mr. Mulkey:

Q. Will you give your name please?

A. Ray J. Travers.

Q. Mr. Travers, where do you live?

A. Route 3, Box 4954, Oroville. That is on the old Quincy road.

Q. What is your business or occupation?

A. I am an insurance agent in the town of Oroville.

Q. Do you know the defendant here, Jack Atchley?

A. Yes, I do.

Q. Were you summoned to see him at the Oroville county jail on or about the 4th or 5th of August of this year?

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A. I believe it was on the 5th of August, yes.

Q. You saw him on the 5th?

A. I did.

Q. When were you called to see him?

A. Well, it was the previous day at 6:00 o'clock in the evening if I recall, and Vernon called me on the phone and asked me to come to the jail the next day.

Q. So pursuant to that request by the defendant you went to the jail the next day, is that right?

A. I did.

Q. And you had a conversation there at the jail with him, did you not?

A. I did.

Q. And that was in the morning?

A. It was approximately 10:00 o'clock.

Q. After that conversation did you report that conversation to anybody in the sheriff's office?

A. Yes. After I finished talking with Jack—Vernon I have always called him—and I stopped by and saw the Undersheriff Mr. Spann, I believe is his

name, and he asked me if Jack had said anything and I said yes, and Jack had told me what had happened on the morning I believe of the death of Marcella.

Q. Were you asked then if he would mind if that could be recorded?

A. Yes, I was.

Q. Did you then at about noon on Tuesday the 5th go back into the interrogation room and talk with Mr. Atchley?

A. Yes, I did. I had to have further information from my company also.

Q. At that time ——. This was after you had the sheriff—the sheriff had said—or the undersheriff had

[997]

asked you whether you minded if that conversation be recorded, is that right?

A. That's right.

Q. You have just been in our office downstairs and had occasion to listen to this tape. Is that a tape recording of your conversation with the defendant at that time and place?

A. It is, yes.

Q. Did you offer any threat to Mr. Atchley to get him to talk to you about these things that are contained on this spool?

A. Absolutely not.

Q. Did you offer him any inducement or anything to get him to talk to you?

A. No, I did not.

Q. You in fact indicated to him that this would have to be reported to your company as far as whatever information he gave you, did you not?

A. Oh, yes, absolutely.

Q. So he understood that when he was talking with you?

A. Oh, yes.

Q. And he called you with reference to a policy on his wife's life of which the beneficiaries were the children?

Mr. King: Just a moment now, if the Court please. I object on the grounds that the question is leading and suggestive. I have no objection to the witness testifying but ——.

Mr. Mulkey: Q. What did he call you ——.

Mr. King: I don't want Mr. Mulkey to testify.

The Witness: Well, mostly ——.

[998]

Mr. King: And I move that the answer be stricken and start over again.

Mr. Mulkey: There wasn't any answer, Mr. King.

Mr. King: I heard an answer.

Mr. Mulkey: Did you?

The Court: If there is any answer it is stricken.

Mr. Mulkey:

Q. What did he call you about when he asked you to come down?

A. Well, more specifically Jack wanted me to bring him some cigarettes, and when I went down to the jail the next day he wanted me to bring him some cigarettes and also wanted to talk about the policy.

Q. What policy?

A. That was the life insurance policy written on Mrs. Atchley.

Q. He was no beneficiary under that policy?

A. Absolutely not. He had no power whatsoever as far as the policy is concerned.

Q. That policy was actually taken out by Mrs. Atchley?

A. By Mrs. Atchley, and the children were the beneficiaries and Jack was the final beneficiary.

Q. And this was taken on Tuesday the 5th of August at about noon, is that right?

A. Right. I mean, I hadn't been informed they were going to take a tape recording and I surmised as much but I didn't know they had taken it. And it [was] 10 or 15 minutes after 12:00 when I actually knew a tape recording had been taken.

Q. But the statement was on that date and about that time?

[999]

A. Yes, it was.

Q. And this statement was free and voluntary to you as far as Mr. Atchley was concerned?

A. Oh, yes, absolutely.

Mr. King: I object to it on the grounds it calls for the opinion and conclusion of the witness and ask that the answer be stricken.

Mr. Mulkey: I think this witness can observe whether he made any threats or promises. I think it is a fair statement to be made, Your Honor. He would certainly know whether any coercion was put on the man.

The Court: I think, Mr. Mulkey, it should be presented in a different way than that. That is an opinion and conclusion in connection with this matter.

Mr. Mulkey: Q. You made no threats or promises to this man to this man to get him to make this statement to you, did you?

Mr. King: Again I object, if the Court please, that the question is leading and suggestive and move that the answer of the witness be stricken.

The Court: Did the witness answer?

The Reporter: No.

Mr. King: I saw the witness answer.

The witness: I shook my head.

The Court: The answer is stricken. The question was leading.

Mr. Mulkey:

Q. Did you offer this man anything to get him to [1000]

talk to you?

A. No, except I did bring him some cigarettes that morning.

Q. Which he had asked you to bring to him?

A. That's right.

Q. Did you threaten him to get him to talk to you?

A. No, I did not.

Mr. Mulkey: That is all. I now offer this tape into evidence, Your Honor.

Mr. King: Just a moment, if the Court please. May I cross examine the witness before you start playing your record?

Mr. Mulkey: Only as to the preliminary portions, Counsel.

The Court: You may cross examine.

Mr. King: Thank you, Your Honor.

*Cross-examination*

By Mr. King:

Q. Mr. Travers, you have known Jack for quite a long time, haven't you?

A. Approximately one year, yes, sir.

Q. You knew his wife, did you?

A. Yes, I did.

Q. Were you friendly with Jack?

A. Oh, yes.

Q. He had been to see you, had he not, on numerous occasions about insurance?

A. Yes, he had.

Q. And you were his insurance agent?

A. That's right, I was.

[1001]

Q. And you did have a rather confidential relationship with him then, did you not?

A. Yes, I did.

Mr. Mulkey: I object to the question. It calls for the opinion and conclusion of the witness.

The Court: The objection will be sustained.

Mr. King: Very well.

Q. Now, going into the nature of your relationship with Jack, he would call at your office, would he not?

A. That's right.

Q. And you would discuss various insurance problems with him, would you not?

A. That's right.

Q. Were you aware, Mr. Travers, that your client Jack couldn't read nor write?

A. Well, he signed his name. I was not aware that he could not read or write, but I knew he could sign his name.

Q. Did you ever offer him anything to read such as a policy or anything of that sort?

Mr. Mulkey: If the Court please, I fail to see whether the defendant could read or write bears on the voluntariness of the statement, which is the only thing in issue at this point.

Mr. King: Well, now, if the Court please, I think that this witness will testify from what I have heard here—and I have not talked to you, have I?

A. No, Mr. King.

Q. This is the first time?

A. This is the first time, yes, sir.

[1002]

Mr. King: First time that the witness was writing things on a pad or on a paper at the time that he interrogated Jack in the counsel room of the local jail.

Q. That's right, isn't it?

A. That's right, yes.

Q. And did you ——.

Mr. Mulkey: I am going to object to ——.

Mr. King: Now ——.

Mr. Mulkey: Just a moment. I have an objection and I would like to get a ruling from the Court. Whether the man could read or write or whether this man made any writings himself has no bearing on the inquiry before the Court now, which is the voluntariness of this statement.

The Court: Well, I don't see it, Mr. King. How does it relate to their discussion under this date?

Mr. King: As Your Honor will recall, when we heard this tape recording there was a remark and several remarks made by this witness about "Now, I

don't want to write this part of it down but I will have to send in this part to the company" and so on. Now, I wanted to find out from the witness just what he wrote down and what he sent to the company if anything.

Mr. Mulkey: I think that has no bearing on the free or voluntariness of this statement, Your Honor, and I submit that objection.

Mr. King: If the Court please, he went into the matter on direct examination about this very, very thing, and I think I have a proper right to cross [1003] examine him on that, on his statement that he did go there to the jail and that he did have a conversation with Jack and that certain things were written down. I just want to know if Jack knew what was written down.

The Court: The objection will be overruled. You may proceed.

Mr. King:

Q. Will you please answer the question?

A. Yes. I took notes regarding the children. I was writing down the ages of the children more specifically was what I wrote down.

Q. And how many children were there?

A. I think there was five altogether.

Q. Do you recall their ages?

A. Offhand I can not. I think the oldest girl was 15, and then right on down the line to about three years old.

Mr. Mulkey: If the Court please, I am going to object to this proceeding. Mr. King will have oppor-

tunity to cross examine this man at his leisure after the introduction of this statement, but his examination at this point is limited solely to whether this statement was free and voluntary or not. After the statement is played he can examine and cross examine this man as much as he likes. What the ages of the children were would have no bearing on the voluntariness of the statement.

Mr. King: May I say that what I intend to show here, Your Honor, so perhaps Mr. Mulkey will not [1004]
have to object, I wanted to elicit from the witness information concerning Brenda, the youngest child, the subject matter of a policy that was testified about. Now, it is very material to the defendant's case that it be shown by this witness—and I am sure it can be —that Jack did say that Brenda was his child.

The Witness: That's right.

Mr. King: And that if that is a fact then there might have been some inducement, Your Honor, to qualify this statement that will be played here, I take it, to show whether or not it was given freely and voluntarily. That is the purpose of my asking about that child.

The Court: Well, that is not an inducement which would render inadmissible a recording of the statement, Mr. King, so the objection is sustained.

Mr. King: Very well.

Q. Now, you did discuss the policy of insurance?

A. Oh, yes.

Q. With him. And as you have said you made a list of the children?

A. That's right.

Q. Would you tell me about that policy? What kind of a policy was it?

A. As I recall it was a whole life policy.

Q. On the life of the decedent?

A. That's right.

Q. Katherine Marcella?

A. That's right.

Q. Ferris. Now, did you write that policy in the name of Ferris or Atchley?

A. Atchley.

[1005]

Q. Now, going back to these conversations and dropping that matter for a moment, you did have, as I understand you to say—and you correct me if I am wrong—you did have two or three conversations with him? Did you have two conversations prior to the tape recording or just one conversation prior to the time this tape recording was made?

A. I don't quite understand your question. You mean on the 5th?

Q. On the 4th or 5th. Did I understand you to say you went there the afternoon of the 4th and had a conversation with him?

A. No. That was a telephone call that evening at my residence. Jack called me that evening.

Q. Then you only had one conversation prior to the conversation that was tape recorded, is that so?

A. On the 5th, yes.

Q. And that conversation was had in the morning of that day?

A. Approximately 10:00 o'clock.

Q. And it was about an hour in duration, was it?

A. That I can't recall.

Q. Would that be a good approximation?

A. A good approximation, yes.

Q. It might have been longer than that?

A. Well, it might have been shorter. Most likely shorter.

Q. But it was in the neighborhood of an hour you think?

A. I couldn't say for sure.

Q. At that conversation did you discuss the matter of the policy?

A. Yes, we did. It is the same general type of questions and answers that were discussed on the second meeting.

[1006]

Q. Now, when you came down to the jail did you converse before you walked in to see Atchley in the lawyer's conference room—and I take it that is where your conversation was had, in the box down there ——.

A. The glass ——.

Q. —— where the glass is on the windows?

A. Yes, I believe that's it. There was glass there.

Q. I will refer to that as where we lawyers confer with our clients, lawyers' conference room.

A. Yes.

Q. Did you have a conversation with any of the officers prior to the time you went back and Jack was unlocked and brought around—is that true?

A. That's right, I did.

Q. And what officer did you talk with?

A. I don't know them too well. The jailer was one and I was then taken into the undersheriff's office.

Q. That is Officer Spann?

A. Right. And my one question to them was, naturally, if I could see Mr. Atchley, and they said yes. And then my other question was to them if I could bring him cigarettes, and they said no, that they had a commissary downstairs and that they would not allow it.

Q. At that time they didn't ask you to interrogate him on the shooting, did they?

A. No, sir, absolutely not.

Q. But as I understood you on direct examination you did interrogate him and asked him questions concerning the shooting?

A. The second time, yes.

Q. Did you mention it at all the first time?

A. No. Mr. Atchley brought the subject up to me [1007]
when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time.

Q. And you sat there and listened to the whole story?

A. That's right.

Q. Now, was that story that he told you first substantially the same as you heard played down in the District Attorney's office the second time?

A. Yes, it was.

Q. Did you make notes of that conversation?

A. The second time?

Q. Yes.

A. Just on the children only, just the ages of the children because I had the names of the children but not on the application, and that application is on file in Berkeley, California.

Q. What company by the way?

A. State Farm Insurance, life insurance company.

Q. When you first questioned him did you have occasion to make any writing at all?

A. No, I did not.

Q. But on the second time you tell us then that all you made notes of was just the ages—did you say the birth dates of the children?

A. That's right.

Q. And you made no other memoranda?

A. No, I didn't. I take that back. I want to withdraw the first question. I did take one note, and that was——.No, That was the second time. It wasn't [1008] the first time. And that was another note I took, was the address of Jack's brother and his sister because he wanted me to contact his brother and sister regarding his baby and wanted me to have them come down to the sheriff's office and take custody of the child.

Q. That was Brenda?

A. That was Brenda, his baby, yes.

Q. The girl that you first mentioned?

A. Yes.

Q. One of the five children of Mrs. Atchley?

A. Yes.

Q. Isn't it true that when you first talked to him you told that you had to have certain information for the purposes of your company?

A. Not when I first went in, no. As I recall I went in to see Jack that day on Jack's request also, and I brought in the cigarettes.

Q. Is this the first time you are talking about?

A. This is the first time. That is in the morning. And Jack told me about this and he just brought the incident up. I was going to ask him about it but he brought it up first when we were sitting there and he told me exactly what happened.

Q. Did he tell you that he was trying to get a lawyer at that time?

A. Yes, he was.

Q. And did he tell you at that time that——

Mr. Mulkey: Just a moment, Counsel. I am going to object to that question, whether the man wanted a lawyer, had a lawyer or intended to get one has nothing to do with the freeness and voluntariness of the statement.

Mr. King: If the Court please, I intend to show by [1009]
this witness—and he has just said he has not conversed with me at all and I don't even know the man, we have never been acquainted——

The Witness: Not to my knowledge.

Mr. King: Now, if the Court please, out of the lips of this witness I wish to elicit this information, and I am sure the witness can give it to us: That when he went in the first time to talk to Jack, Jack said that he had requested a lawyer on numerous oc-

casions from the sheriff's department, and from the sheriff himself, and that they had not permitted him to talk with a lawyer up to that time.

Mr. Mulkey: Just a moment.

Mr. King: That he wanted to tell the lawyer what had happened there and he didn't have a lawyer.

Mr. Mulkey: Just a moment, Counsel. Whether this is true or not it still does not go to the question of voluntariness. This is adjudicated by large volumes of case law.

The Court: Ladies and Gentlemen, you are to disregard the statement just made by Mr. King. Whether Mr. Atchley did or did not have a lawyer has no bearing on this particular point.

Do you have any other questions, Mr. King?

Mr. King: Yes. Thank you, Your Honor.

Q. Now, going back to the second conversation you say that you took some notes at that time?

A. Yes.

[1010]

Q. You had talked with the officers when you went back in the second time, you had stopped and talked with Mr. Spann and some members of the sheriff's department?

A. That's when I left Jack the first time I talked to the undersheriff, that's right.

Q. The undersheriff? Was any other person present?

A. No, not right at first there was not, no.

Q. Isn't it true that the undersheriff requested you to come back and have a further conversation with Jack?

A. Well, I had to get some information, Mr. King. In a way I will say yes and no on that particular answer. I had to get information when I went back to the office also and I was planning to come back and see Jack.

Q. But the undersheriff did suggest that you come back?

A. That is right.

Q. And he told you at that time that they would tape record conversations?

A. He asked me if I would mind and I said, "Well, no, I wouldn't mind at all." Jack give me the information, he knew it was going to be a matter of record. I told him I had to report it to the company. I could see no harm in taking a tape recording.

Q. But you didn't at that time, of course, know that it was going to be offered in evidence here?

A. No, I can't truthfully say I did, sir.

Q. Now, at the time the Officer Spann asked you to go in and question the witness he said substantially this, did he not: "You go back in please and [1011] question Atchley and bring out all of the various points that we discussed this morning so that we can take it down on the tape recorder."

Mr. Mulkey: Just a moment, Your Honor. This again does not go to voluntariness or freeness of the statement.

Mr. King: I submit, if the Court please, it is the very essence of voluntariness, whether or not this defendant did voluntarily make a statement.

Mr. Mulkey: What Mr. Spann——

Mr. King: He made the first statement it is true. Now I am talking about the second statement that was taken down by tape recording.

Mr. Mulkey: What Mr. Spann may or may not have said about this man, about what he wanted him to bring out on the tape, goes in nowise to any voluntariness of this defendant. On cross-examination Mr. King can bring out whatever he thinks he has in mind.

The Court: I think the objection is well taken. It will be sustained, Mr. King.

Mr. King: Q. Now, you did talk to him at some length about what occurred over in Gridley?

A. I did, yes.

Q. And you don't know, do you, whether or not every word that you uttered there was taken down by tape recording?

A. I had a fair idea it was. I did not know it was actually taken until after I walked out of the room and they had taken Atchley downstairs and they took [1012]
us upstairs the second time when I was talking to Vernon, Jack, and took us into a room and they said somebody was in the other room and they took us upstairs.

Q. Was that the second time?

A. That's the second time, right.

Q. At what stage of the proceedings did they take you upstairs?

A. Pardon?

Q. At what stage of the conversation did they take you upstairs? Did they come in and break into the

conversation and take you upstairs, or just how did they do that?

A. Oh, no, no. I was upstairs. They took me up to this room and then they brought Mr. Atchley and right after I was seated there myself.

Q. And that was on the second——

A. That was on the second floor, yes, sir.

Q. No tape recording was taken at the first conversation down in the lawyers' room that you know about?

A. Not to my knowledge. The first and second conversation was just about the same except I asked more questions the second time and this tape recording here, as I just heard this down in the District Attorney's, is the same one.

Q. Yes. It records parts of your—or attempts to record part or all of your conversation, does it?

A. Yes, it does.

Q. Was anything else said? You were down listening to it. Was there anything else said that wasn't taken down by the tape recording at that time?

[1013]

A. Well, there was a brief—right at the first of the tape there was a brief, very dim at the very first part of the tape where Vernon was telling me to go out and see his brother and his sister-in-law regarding his little daughter Brenda because he was quite concerned about Brenda.

Q. I see.

A. It was the directions he was telling me to go out there.

Q. Concerning the matter of the beneficiaries you said something about a final beneficiary. Would you explain that to me? Does that mean that all of the children would have to die first before Jack would take anything by the policy?

A. Yes, sir.

Q. Is that what I understand?

A. Yes, sir. And that is all five children. In other words, you have your primary beneficiary, your secondary beneficiary, and your primary beneficiary, which would be Jack himself. He would have to wait until all five children were deceased before he would get one dime out of it.

Q. Now, were you talking with him about that very point when you—in your first conversation?

A. Not to my knowledge.

Q. You might have?

A. I might have, yes, sir.

Q. Do you know whether or not Jack knew that the conversation was being recorded?

Mr. Mulkey: I am going to object to that question, [1014]
Your Honor, on the grounds it bears in nowise on the voluntariness. There is no duty in any way to inform a defendant that his conversation is being recorded at any time.

The Court: The objection is sustained.

Mr. King: Very well, Your Honor. You may proceed, Mr. District Attorney. Play your recording. Of course, my objection goes to it.

Will you approach the bench, Counsel?

(The following proceedings were had out of the hearing of the jury:)

Mr. King: Your Honor, do you want the court reporter to take down the tape recording? It might have been changed and might not.

The Court: I am going to instruct him that it is not necessary. I will do it on the record. The tape speaks for itself.

(The following proceedings were had in the hearing of the jury:)

The Court: Mr. Reporter, it will not be necessary for you to take the tape as it is played back.

(Thereupon the tape recording was played.)

[1015]

Mr. Mulkey: Is that a recording of that conversation at the time that I have mentioned to you before?

A. Yes.

Mr. Mulkey: Your witness.

*Offer in Evidence*

The Court: Are you going to offer the tape?

Mr. Mulkey: Yes, Your Honor, I would like to offer this tape in evidence at this time as People's Exhibit No. 34.

Mr. King: Well, Your Honor, without going into all the objections I have heretofore made, I would like to have the record show that the objections have been entered the same as if they were fully set forth.

The Court: The record will show that the objections are noted and the Court has ruled upon them. I think before you cross-examine, Mr. King, if you wish we can take a recess.

Mr. King: Yes, if Your Honor please.

The Court: At this time we will take a 10 minute recess. Please remember the instruction of the Court, Ladies and Gentlemen.

(At this time a short recess was had, after which the following proceedings were taken:)

Mr. King: May it please the Court——

The Court: (Int.) Let the record show the jurors are present and seated.

*Colloquy Between Court and Counsel*

Mr. King: If the Court please, in your absence and in my absence a moment ago while part of the jurors were seated here in this Courtroom, a part of them had gone outside, Mr. Grinnell saw fit to come into the Courtroom and wave around two pic-

[1016]

tures here which, while they have been introduced in evidence, I am indicating Photographs People's Exhibit 17 A and People's Exhibit 17 B, so that the jury could see them. Now I have been trying my best to carry on and conduct a legitimate and a fair trial here and I know Your Honor appreciates what we have done here but I do feel that counsel should be admonished that during the recess that he should not present evidence to part of the jury in the absence of the rest of the jury. I don't feel it is fair to wave around pictures of that character before this jury or part of it.

Now while the jury no doubt will see the pictures and they will be placed on the board, I do feel counsel should be admonished not to do that again; and fur-

ther while I realize in his zealousness to prosecute this case he probably did it inadvertently it does have a bearing on what goes on here. I do request Your Honor to admonish those members of the jury who saw Mr. Grinnell waving them about to disregard entirely any inferences concerning them.

Mr. Grinnell: Well, Your Honor——

The Court: Mr. Grinnell, it is not necessary to reply. Mr. King, I know Mr. Grinnell was thinking of preparing for a witness who will appear here in a moment or two and I am sure prejudice has been done. Those pictures are admitted in evidence and they should all be seen and studied by the jury, so let it be understood by all that Mr. Grinnell was not trying to present evidence to part of the jury during the recess or anything of that kind.

[1017]

Mr. King: That is correct, Your Honor, as I say it was probably through inadvertence.

Mr. Grinnell: Well, I didn't even have the pictures, I was just taking the others off the blackboard when Mr. King was in here.

Mr. King: There is another matter before I start cross-examination of this witness that goes to fairness in the progress of this trial. I followed the witness out to the anteroom in the brief recess that was just had and I asked the witness if I could visit with him. He indicated his affirmness that he would talk with me about what presumably I was going to ask him about what transpired in the conversation, which I have a proper right to do and thereupon Mr. Mulkey came and said he didn't want him to talk to me. Mr. Mulkey

waited there while I was there for five minutes or more. He told the witness whatever I wanted to ask him I could ask him under cross-examination, which is right, I mean which is true, I can ask him proper questions on cross but I do feel that that did prejudice this witness as against me and does make my burden a little harder to cross-examine him after Mr. Mulkey gave him a dissertation on what I might do in my private conversation with him.

The Court: Now, Mr. King, you were given a copy of these tapes quite some time ago and you were given a reporter's transcript in printed form of what is contained on the tapes and you knew that Mr. Travers was going to be a witness here. Your observation [1018]
and remarks are entirely out of order and I request you Ladies and Gentlemen to entirely disregard them. Now please proceed.

Mr. King: Very well, Your Honor.

*Cross-Examination*

By Mr. King: Q. Mr. Travers, you say you have been a friend of Jack's for this past year and that you have done business with him?

A. That is right.

Q. Now when the Sheriff requested you or the—I will withdraw that. When Mr. Spann, the Undersheriff, requested you to go in and question the accused, and recalling your attention to that conversation with Mr. Spann, just what did he ask you to do?

A. He said that they were going to take a tape recording and I assumed they were of the conversa-

tion. He said, "We would like to have a tape recording of that" and he asked me if I would mind and I said, "Absolutely not", Jack knew it was going into the company and there would be a record of the conversation that he gave me that morning so I could see no harm in that myself and I said, "Fine" so we went up to the room and talked to Jack about it.

Q. Yes, now did he tell you to bring out all of the things that you talked about on your morning conversation?

A. Well, as well as I can remember, Mr. King, he didn't mention that to me at all. As far as I can remember he just told me to go up and ask Jack about the same conversation that was given that [1019] morning, which I did.

Q. It wasn't your intention at all to slant the questions from the prosecution view point, was it?

A. I don't quite understand that.

Q. In other words in listening to the tape recording I noticed that in quite a number of instances you would ask him questions which were slanted from the prosecution's viewpoint of this case.

Mr. Mulkey: Just a moment, I think that is a conclusion Mr. King has drawn from the tape that these questions were slanted from the prosecution's viewpoint of the case.

The Court: The objection is sustained. If you wish to ask a question along that line you may ask the witness if he did slant questions but you need not express your own opinion, Mr. King.

Mr. King: Very well, Your Honor. (Questioning witness) Now while you were questioning the witness, well, he wasn't a witness at that time, excuse me, when you were questioning Jack.

A. Yes.

Q. You knew that he wasn't under oath, he wasn't a witness, that is right, isn't it?

A. That is right, I knew he wasn't under oath to answer that.

Q. But you felt he was telling you the truth, did you?

A. Yes.

Q. And you feel that the tape recording is the truth?

A. Yes, that is exactly what Jack told me both times.

Q. And the statement he made in the tape recording that he had no intention to shoot her, and let me read just exactly what he did say in that regard, was [1020] the truth.

Mr. Mulkey: Just a moment, don't answer the question.

Mr. King: I will reframe the question.

Mr. King: Q. I am calling your attention to the part of the tape recording on line 25.

Mr. Mulkey: What page?

Mr. King: Line 25, page 47. Ques. "She was running around with fellows" and your answer was, "Yes". That question and answer transpired in the tape recording, did it?

A. Yes, it did.

Mr. Grinnell: That wasn't his answer, Mr. King, you said, "Your answer was 'Yes'", that was Mr. Atchley's.

Mr. King: Excuse me, yes, that is correct. (Questioning witness) And then there was a question, "Oh, I see. God oh mighty, that would make a guy feel sort of bad" and he answered, "Uh-huh" and then you queried him, "Did you just plan on scaring her or scaring him" and he answered, "Yes, just scaring him" and then he went on to say, "But I didn't intend to kill her at all, not at all". He made that declaration to you?

A. He did.

Q. Now when he indicated to you and I don't see it in the record here nor can I make out from the tape recording when he indicated that he had the gun in his belt, was it—you mean to say that the gun was shoved down like this (indicating), indicating down between his shirt and his belt?

A. That is the way I understood it, yes, so that the gun was actually visible.

[1021]

Q. And when he showed you down there that was the way it was, was it?

A. Yes.

Q. Of course we don't know except what you tell us here because just he and you were present?

A. That is right.

Q. And you are very definitely sure that he—

A. (Int.) That is right.

Q. He indicated it that way (demonstrating).

A. Jack Atchley showed me like that (demonstrating) the gun was actually visible.

Q. Did he tell you he had gone into the little house in the back of the dwelling, if you can remember, in either your morning or your afternoon conversation?

A. Mr. King, I don't remember.

Q. He might have told you that in the morning?

A. He might have, I don't remember.

Q. But you didn't question him any as I take it in the afternoon conversation concerning that?

A. I just can't recall, Mr. King, whether he said so or not. He told me he was by the side of the house, I remember that very distinctly.

Q. But in this tape recording you didn't hear anything about the little shed, you didn't question him anything about that on the tape recording?

A. No, I don't believe I did. He said he was waiting by the side of the house, that he was assuming or actually——

Q. (Int.) Just a moment, are you telling what you thought he said or what he thought he did.

[1022]

A. No, what he actually told me.

Q. Oh, I see.

A. These two conversations, about the morning and the afternoon, are so closely knit that some of the conversation, I mean, well lapped over into the first and the second, if you understand what I mean.

Q. Well, we don't have the first conversation here.

A. No.

Q. In fact it was interspersed with this, you were just bringing out points in the tape recording that hadn't been brought out in the conversation before.

A. They had all been brought out that morning, Jack told me everything that morning.

Q. And he told you freely, did he?

A. He sure did.

Q. And going into that matter, when he had the discussion with his lawyer, did he make any declaration to you at that time that he was going to tell his lawyer exactly what happened?

Mr. Mulkey: And what time, Mr. King?

Mr. King: Q. In the morning conversation.

A. It seems to me as I recall that Jack was, actually didn't have a lawyer at that time. One was spoken for and I believe it was your name that was mentioned, Mr. King, and then Mr. Atchley told me he didn't know whether you would be his lawyer, but he was contemplating on obtaining a lawyer in San Jose, California, the name was repeated on the tape.

Q. Yes, I heard the lawyer's name, however, I am not acquainted with him, but he did mention he was trying to get ahold of me, did he?

A. No, I think he said his——

[1023]

Q. (Int.) His brother was trying to get ahold of me at my residence in Pulga?

A. Actually what was said, what actually transpired he said, if I recall right that he didn't know if you would take the case.

Q. Well, would it refresh your memory at all if I told you that he referred to his brother calling me,

but my phone, that they couldn't get through on the phone or something of that kind, does that refresh your memory at all?

A. No, it does not, Mr. King.

Q. But he didn't say that he had talked to me at that time?

A. I can't remember if he said he had or hadn't. That you had refused or he didn't know whether you would be his lawyer or exactly what transpired as far as his lawyer was concerned.

Q. For your information I hadn't talked with him at that time.

Mr. Mulkey: Just a moment, counsel. Is Mr. King under Oath, Your Honor, I don't think that——

Mr. King: (Int.) I will withdraw that statement, Your Honor.

The Court: Ladies and Gentlemen, you are instructed to disregard side remarks of counsel such as that.

Mr. King: Q. Now getting the whole conversation, I mean by that the conversation in the morning and the conversation in the afternoon that was recorded here, you say, did I understand you to say that part of the conversation that you had in the morning wasn't reduced to the tape recording here in the afternoon?

A. The whole general conversation of the first in- [1024]
terview with Mr. Atchley and the second interview was almost identical, there might have been a few little incidents that was left out, that possibly was left out as far as this building you are referring to

in the back. I remember reading something about a building in the newspaper and that is what is actually confusing me whether it was actually brought up in the morning, whether it was in the newspaper or whether it was in the second interview.

Q. Yes, I see, in other words it is indistinct in your mind just what statements he might have made in the morning.

A. It is just on this one particular instance.

Q. Well now—but he did tell you in the morning before the tape recorder was on that he had gone over there to look for his wife, he did say that, didn't he?

A. He went over to meet his wife there.

Q. Meet his wife, he had a date with her, did he?

A. Well, as I recall Jack said he went over there to wait for his wife, that she was at a dance I believe he said, at Robinson's Corners I believe.

Q. Well, that was generally on the tape recording, now I am trying to refresh your memory about the morning conversation. He did say he had a date with his wife in the morning conversation?

A. I think he did, about 8 o'clock at the dance, that he was supposed to meet her at the dance and he had some work to do and he couldn't make it and then he met some fellows and had a flat tire and by the time he got through with the fellows he was meeting and said good bye, it was after midnight, I believe, and then he went to Gridley and he waited for his wife, expecting she would come home, and the fact he knew she was running around with some one,

[1025]

that he was going to wait there and that is where in the second conversation, and also in the first conversation, it was brought up that he waited for his wife alongside of the house.

Q. Along the corner of the house?

A. Yes.

Q. Now just a moment. Going along with that, did he tell you he went to Robinson's Corners about 12 o'clock of that day, or that evening?

A. I can't recall whether he did or he didn't.

Q. He might have told you that?

A. He might have, I don't remember. As I understood him he said that he did not because he was with the fellows and they went over to some tavern and they had a beer, I believe, and he had a flat tire and it was too late then.

Q. What time was the flat tire, did he tell you?

A. I don't recall the time but it was between say noon and midnight, I can imagine that.

Q. But is it your statement now that he didn't tell you that he went over to Robinson's Corners?

A. As I say I can't remember.

Q. Now did, in either of the conversations did he fix the time I heard on the tape recording, but in the conversation you had with him in the morning, did he fix the time that he arrived in Gridley exactly, [1026]
did he tell you anything, for instance, "I looked at my watch and it was that time", anything of that sort?

A. No, not the exact time, he said approximately as I recall between 1:30 and 2 o'clock also in the

morning conversation and also I think that is what he stated in the tape recorder too in the second conversation.

Q. In the morning conversation you didn't pin him down as you did in the afternoon conversation as to how many minutes he was there, I take it?

A. It was about the same general conversation about the time. Actually when Jack was telling me this, I was just sitting there and listening in the morning. It wasn't mentioned.

Q. You weren't questioning him then?

A. Yes, I was actually asking him questions because I was concerned too.

Q. But not as many questions as you asked in the afternoon after the officer asked you to develop the story?

A. No, sir.

Q. And Officer Spann did ask you to develop the story so that he would have a tape recording of it?

A. Well, I knew that he was going to have a tape recording as I told you, but Mr. Spann did not say to go in there and ask all these qeustions. I would like to clarify before this Court at this time that I was a Deputy Sheriff for three and a half years.

Q. I was just going to ask you that question.

A. And it was just a general line, and I did work homicide and all felonies and it is general routine of asking questions, as a line of interrogation, of ques-

[1027]

tions that I did ask Jack Atchley.

Q. I was just going to ask you that. Now in your experience as a police officer, where did you have your experience?

A. Las Vegas, Nevada.

Q. And were you working under the Sheriff's Office on homicides at that place?

A. Yes.

Q. And you have had a good deal of homicides, possibly, have you?

A. Two years, sir.

Q. And you have interrogated many witnesses?

A. I have.

Q. And you know then what is necessary to prove in order to convict a witness of any crime involving a homicide.

Mr. Mulkey: Just a moment, I know many officers who do not know what is necessary to convict somebody and I don't know that has anything to do with this case, the question was, "And you know what it takes to convict a man of homicide" referring to this man's experience as an officer in Nevada.

The Court: I don't see it has any bearing. The objection is sustained.

Mr. King: Very well. (Questioning witness) Mr. Travers, I will ask you generally when you took statements from witnesses involved in a homicide you would ask certain questions concerning those homicides, would you not?

A. That is right.

Q. And they would follow more or less of a definite pattern, isn't that so?

A. That is right.

[1028]

Q. And that definite pattern, sir, from your experience was followed generally on this tape recording.

A. From a habit, yes.

Q. You called on your experience as a police officer to interrogate the witness so that the People would—well, I will withdraw that. You called on your experience as a police officer to interrogate the witness to find out whether or not a crime had been committed, isn't that true?

A. Actually, Mr. King, I had a chance to go into law enforcement. And to answer your question, I see what you are getting at. This information that was given me was completely voluntary. I was not turning into any sleuth or detective or anything like that. I got out of the detective work and what I wanted to actually get from Jack was actual information and the information that Jack gave me was given completely voluntary.

Q. And you know it was the truth?

A. I sure did. Jack has never lied to me yet.

Mr. Mulkey: I will ask that question be stricken, that is asking for the witness to characterize testimony which is a job for the jury.

The Court: Which answer?

Mr. Mulkey: "I thought it was the truth" or, "You thought it was the truth". The witness state whether this was the truth or not, Your Honor. That is what the 12 people will decide on the trial of this cause.

The Court: The objection is sustained and the answer will be stricken.

[1029]

Mr. King: Very well, Your Honor. (Questioning witness.) Now, Mr. Travers, isn't it true that the

experience that you have had as a peace officer caused you in this case to query the witness with that in mind, that is to say, when you asked him the questions, as you ask him here, that we heard over the tape recorder, you were following the definite pattern that law enforcement officers ordinarily proceed in a questioning of a witness were you not?

A. Well, Mr. King, any time a man tells me he just killed somebody, I think it is the job of every citizen to find out what happened and that line of questioning was actually semi-professional due to the fact I had had that work, and naturally that is the only way I would question anybody and when Jack was giving me that information he was telling me what I assumed was the truth, the man has never lied to me that I know of and so I was concerned with it.

Q. You found him to be truthful?

A. Right.

Q. But my point was, and what I want to ascertain was, of course you can't put yourself in the position of the accused, nor do we want you to, but don't you feel in questioning him you could have brought out many things that would have been to his advantage, had you cared to do so?

A. I see no train of thought here that I thought was of disadvantage to Mr. Atchley.

Q. Could you have—you feel it is not of a disadvantage to him?

A. I see nothing in what he told me that is of [1030]

disadvantage to Mr. Atchley.

Q. Of course that is entirely up to the jury.

A. That is right.

Q. But it was from your general conversation with him now both the morning when you talked with him and there was no recorder and in the afternoon when the statement was recorded that Jack gave you a full and complete account of what occurred that evening.

A. What Jack told me I assumed that it was an exact account of what had happened.

Q. I notice in the tape recording about the 20 or 25 minutes he said he was over there, did it occur to you to ask him where he was or what he was doing at that time, or did he explain that to you in the morning conversation?

A. Now, over where.

Q. Over Gridley, as I got from the tape recorder here he was over there for 20 or 25 minutes?

A. Yes.

Q. Did it occur to you to ask him in the morning conversation what he was doing during that 20 or 25 minutes?

A. Yes, that was brought up in the morning conversation.

Q. What did he say?

A. He said the same thing he said in the second conversation.

Q. He was waiting for his wife to come home?

A. Right.

Q. He was standing around there by the corner of the house?

A. Yes, exactly.

Q. Did he tell you anything in your morning conversation about seeing her come through the gate?

A. Yes, he did, that was all brought out exactly the same.

[1031]

Q. And did he say something in the morning conversation about seeing her drive into the carport?

A. The carport, I remember something about a carport, whether she had parked the car in the carport or parked it out in the road, he said she came through the gate and that he stepped around the side of the house directly in her path in front of the door.

Q. That is the same as the tape recording?

A. Yes, it was the same general conversation in both, the only thing I said that was different between the first and the second is I couldn't remember in either one of the conversations about going into a little building that you mentioned, I can't remember that in either morning conversation.

Q. Then chances are it is probable he didn't tell you that or you would have remembered it.

A. I think I read it in the newspaper to tell you the truth.

Q. Your present memory, there was no conversation about that?

A. My present memory regarding this little building that he went into.

Q. In fact you didn't question him very carefully, I mean very minutely perhaps about just what he did while he was there for the 20 or 25 minutes, you didn't go into that, did you?

A. No, I did not, Mr. King. Every question that was directed to Mr. Atchley was what he told me in the morning conversation.

Q. And you say he started in to tell you and he did unfold the whole story?

A. He sure did, yes, sir.

Q. And that was right after telling you—by the way, did he make a statement to you that morning [1032] that, if you recall, that he was waiting until his lawyer came so that he could tell his lawyer exactly what happened?

A. Not to my knowledge. I will repeat that again, Mr. King. I think, Jack, as I remember, Jack told me that I believe it was your name, that the lawyer that was supposed to represent him had not shown up and he didn't know if he was going to take his case but that he was contemplating on getting a lawyer out of San Jose and the name there, I don't remember the name, I have heard it twice on the tape but it was an Italian name, I can not repeat it, I do not remember it.

Q. Excuse me please just a moment. Didn't Jack say something to you that morning about it just like the other time when the gun went off, that they were having a wrestling match over that gun, that same gun, didn't he go into some dissertation on how the gun had gone off once previously?

A. You are speaking of the——

Q. (Int.) The morning conversation.

A. Regarding how the gun went off?

Q. Yes.

A. He told me in both morning sessions that she grabbed the gun from his waist band.

Q. I understand that, but I am not talking about that conversation. I am talking about something that happened previous to that out at Palermo, didn't he tell you on the morning conversation that she had grabbed the gun and they had a wrestling match over it and the thing went off once or twice and went through the window, does that help you any?

[1033]

A. No.

Q. Did he discuss that with you?

A. Not to my knowledge.

Q. You don't recall that discussion?

A. No, I don't recall that.

Q. Now in the morning conversation, Mr. Travers, and I am reading from line 4 on page 48, ques. "And you had the gun in your belt. Did you make an attempt to pull the gun or anything? Ans. No, sir. When I seen nobody but her I didn't make no effort whatever. Ques. She seen the gun? Ans. She seen the gun. Ques. Then what happened? Ans. She grabbed it, lunged right onto it. That's all I could do. I didn't know anything else to do". Did he make that same general statement in his morning conversation, that she grabbed the gun?

A. Yes.

Q. And that they had a struggle over the gun?

A. Yes.

Q. And that the gun had gone off?

A. That the gun had gone off, yes.

Q. Did he tell you in the morning conversation as he did in the afternoon conversation that he did not intend to kill his wife?

A. Yes, he did.

Mr. King: That is all.

Mr. Mulkey: That is all, Mr. Travers. Thank you, Mr. Travers. May we call our next witness at this time, Your Honor?

The Court: Yes.

[1039]

(Reporter's Transcript, p. 1411, line 3 through p. 1419, line 26):

MR. VERON ATCHLEY, a witness produced on behalf of the defendant, after being first duly sworn testified as follows:

*Direct examination*

By Mr. King:

Q. Your name is Veron Atchley?

A. Vern Atchley, yes.

Q. And your friends call you Jack, do they not?

A. Most of them does on account I had my used car lot under "Jack's Used Cars".

Q. And where were you born, Mr. Atchley?

A. Cleveland, Tennessee.

Q. And where is that place in relation to Chattanooga, Tennessee?

A. That is 30 miles north of Chattanooga.

Q. Were you born right in the little town?

A. No, I was born out in the country, not right in the main part of Cleveland, it was in the country.

Q. Now you have heard your brother describe the terrain here, what sort of country was it?

A. Well, it was mountain country where we was farming at that time.

Q. And when did you leave the country in Tennessee?

A. Well, I left the country and come out here in about 1945 or 1946 I guess, I don't know, somewhere in that neighborhood.

Q. About 21 years ago?

A. About 21 years ago.

Q. Or thereabouts. Now how old are you now?

A. 40—going on 42.

[1411]

Q. Now how large a community were you raised in in Tennessee?

A. Well, the town that was nearest to us was about anywhere from 10 to 15 thousand population.

Q. How far away was that town?

A. We was about 15 or 20 miles out in the country, in the mountains, from the town.

Q. Now did you have brothers and sisters?

A. Yes.

Q. And how many?

A. I had 5 sisters and 6 brothers besides myself, made 11, 12.

Q. There were how many?

A. There was 12 of us all told.

Q. Are your mother and father still living?

A. My mother is, my father has been dead for a number of years, about 20 years.

Q. He died just about the time you left from Tennessee then?

A. Yes, just about the time.

Q. Now in your little mountainous community as you have testified, did you go to social affairs?

A. Yes, we went to church out there in the country where they had a little church there.

Q. What church by the way?

A. It was a Baptist Church.

Q. Now did you go to any other social affairs in your young life?

A. Well, we went to dances and stuff like that, if that is what you are referring to.

Q. Now calling your attention to your experience in early life in Tennessee, were you familiar with guns?

A. Yes, we was raised up with guns.

[1412]

Q. Did you, when were you first—when was your first time that you had a gun?

A. Well, I would say I had a rifle when I was 10 to 12 years old, a rifle.

Q. Did you ever own a pistol when you were young?

A. I owned a pistol when I was 14.

Q. And over the years that you have lived in Tennessee did you own more than one pistol?

A. I would say that I could have owned four or five pistols in the period of time in Tennessee.

Q. Did you develop any particular knack with a gun?

A. Well, the only thing when we went to those country dances we always taken our guns with us, when we went out there to those big houses, those house parties with a dance and then if we got into it out there, fight or anything like that, if they wanted

to throw their guns off and battle it out why we would do so.

Q. That was the custom?

A. That was the custom and rule.

Q. How did you carry your gun in those days?

A. We stuck it right down in front of our belt in front.

Q. Were you the only person who did that?

A. No, I am not the only person.

Q. Well, now, how about your friends, did you have some friends there that carried guns too?

A. Friends, yes, most all of them. The man that I had a fight with out at the dance one night, he had a gun and I had one and we talked it over, that we would just fight it out with our fists, and we laid our guns over to one side.

[1413]

Q. I notice a scar on your lip, on the left side of your lip.

A. Yes.

Q. Would you explain where you got that?

A. I got that at one of them dances, at a party, that is when we put our guns to one side and just battled it out with fists.

Q. And then what did you do with the guns?

A. Well, when we got through we got up and shook hands and got our guns and put them back in our belts.

Q. Now going back to your friends in the community, the young friends that you went around with, was it the exception to the rule or was it the general

rule that your friends would carry guns the same way you have outlined here?

A. It was the general rule that everybody in that there mountainous country would carry a firearm.

Q. Now during your lifetime in the 41 years and particularly since you left Tennessee, you have always—or rather, have you had guns?

A. Yes, I have had guns since I left Tennessee, out here.

Q. Do you recall any particular length of time when you didn't have a gun?

A. No, sir, I don't.

Q. And what kind of guns?

A. Well, I have even had a 32 and a 45 and this pistol here that they have here.

Q. That is your gun?

A. Yes.

Q. And did I hear you say anything about a rifle?

A. Yes, I had a rifle, I sold that to Mr. DeCamp.

[1414]

Q. Yes, what kind of a rifle was that?

A. Well, I had a 22 automatic rifle and I had a 30-30 Winchester deer rifle during—I had it last deer season.

Q. Have you ever been arrested for a violation of any of the criminal laws here in California?

A. No, sir.

Q. Recalling to your attention and refreshing your memory please, do you know what 502 is?

A. I really don't know what it is but I know what I got fined for at one time.

Q. What was it?

A. $250.

Q. I mean what was the charge?

A. Drunk driving.

Q. Oh, yes, that it what I wanted you to remember, you were arrested one time for drunk driving?

A. Yes, sir.

Q. How long ago was that?

A. That was back about 1952 I believe.

Q. And was there any other—have you ever been in trouble with that exception?

A. I have been arrested for disturbing the peace, drunk and disturbing the peace.

Q. In this state?

A. No.

Q. Where?

A. In Tennessee.

Q. And that was when you were a young boy?

A. Yes.

Q. Was that on many occasions?

A. No, not on many occasions, it could have been, I would say, two or three times that I got arrested for disturbing the peace.

Q. And that was up to the time you were about 20 or thereabouts?

A. Yes.

Q. Going back to the guns, would you class yourself as a good shot with a revolver?

[1415]

A. Yes, sir, I can shoot a revolver pretty good.

Q. How about a rifle?

A. A rifle, I can shoot a rifle good.

Q. Which do you say you could shoot best?

A. The rifle.

Q. You are a good shot with a revolver, but you are a better shot with a rifle then, is that it?

A. Yes, sir.

Q. Now how long did your formal education last, meaning by that, how long did you go to school?

A. Well, right off handed I maybe went two or three months out of a year, I will say, like that, maybe four months, I won't say just exactly.

Q. I meant what grade?

A. I went past out of the third into the fourth.

Q. Did you attend the fourth?

A. No, sir.

Q. Now, Jack, I am going to ask you, can you read?

A. No, sir.

Q. Can you write?

A. No, sir.

Q. Can you write your name?

A. Yes, sir, I can write my name.

Q. Can you read the newspaper?

A. No, sir.

Q. Well, how do you gain your information for instance from what appears in newspapers?

A. Well, sometimes the newspaper is right and sometime they are wrong.

Q. No, I say if you refer to an article in the newspaper, you said you can't read a newspaper, how would you find out what was in the newspaper for instance, if you wanted to find out what was in it?

[1416]

A. Well, I couldn't unless I had somebody read it.

Q. You would go and ask somebody to read it for you?

A. Yes.

Q. How about other kinds of papers, referring to contracts and things of that sort?

A. The contracts, the secretary took care of all of them.

Q. Well, I know that, but while—you are perhaps referring to Jewel, in your business?

A. Yes.

Q. But referring to other papers that you signed in the past and you perhaps have signed a good many, have you not?

A. Yes.

Q. You have to have people read those to you?

A. Yes, if they are just buying cars and stuff like that they don't have to read them to me because I know just exactly what I am paying for them when I buy them.

Q. You can read figures, can you?

A. Yes.

Q. But you can't read the printed words?

A. No.

Q. Can you read longhand?

A. No, sir.

Q. And that is the written words by hand?

A. No, sir.

Mr. King: Rather than start, on another phase of this questioning, may we have our recess at this time, I notice it is a couple of minutes of the hour.

The Court: Your request is granted, Mr. King. At this time we will take our noon recess. Ladies and

Gentlemen, please remember the instruction of the Court not to discuss the case or form an opinion or [1417]
conclusion. We will take a recess until 1:30 this afternoon.

[1418]

Tuesday, November 25, 1958
Afternoon Session, Tenth Day

Court was called to order at 1:30 o'clock p.m.

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The Court: Let the record show the jurors are present and seated.

The defendant may proceed.

Mr. King: Will you resume the stand please, Mr. Atchley.

*Vernon Atchley,*

called as a witness in his own behalf, having been previously duly sworn, testified further as follows:

*Direct Examination* (Resumed)

By Mr. King: Q. Recalling your attention to the time that you moved from Tennessee to California, about what year was that?

A. It was about 1945 or '46. I don't recall.

Q. Would you move your chair so the jury can see your face please. Thank you. Where did you go there?

A. First, to Indio, California.

Q. You have heard your brother testify here that he brought you out here?

A. Yes.

[1419]

(Reporter's Transcript, p. 1502, line 1 through p. 1503, line 25):

Mr. King:

Q. Why did you go there that night?

A. I went there on the occasion I thought that she, that I would catch her with somebody else coming in after she wasn't in at that time of the night, at 1:00 o'clock.

Q. Were you going to shoot her?

A. No, sir. I was just going to scare them. I wouldn't have shot her at all, no intentions of shooting that woman.

Q. Now after you got in your car what did you do?

A. Well, I drove back home and I buried the gun for the simple reason I wanted, I thought if I could get a hold of an attorney that morning I was going to have him take the gun and have the fingerprints taken off the gun, and that was the reason I wouldn't tell them where the gun was.

Q. Now you did make several statements to the officers afterwards, didn't you?

A. Yes, sir.

Q. And you went through an examination for several hours, for a couple of days, didn't you?

A. Well, from Saturday, all day, no sleep Saturday night, no sleep Sunday, no sleep Sunday night, no sleep until about 4:00 o'clock. I presume I went through a pretty good examination.

Q. How many times did you ask for a lawyer would you say?

A. I would say I asked for a lawyer ten times.

Q. And you asked how many people?

A. Well, everyone that I talked to I still asked them for a lawyer.

Q. And what did you say about a lawyer and the facts of the case?

A. I told them if I got an attorney I would tell [1502]
the truth and nothing but the truth. I think Mr. Gillick will verify that too and Mr. Grinnell too.

Q. You had a conversation with Mr. Grinnell, did you not, in the jail over here?

A. Yes.

Q. In my absence?

A. Yes, I did.

Q. And did you tell him you were telling the truth when you talked to him?

A. Yes, sir.

Q. And what did he say?

A. Well, he said he believed me.

Q. Now did I tell you to tell the truth?

A. You told me to tell the truth, Mr. King, and I have come out with it the best of my knowledge that I could tell it. And when a man does the best he can to do it that is the best he can do.

Q. Would you remove your shoe please? I would like to see what sort of a foot you have.

Mr. Grinnell: I am going to object to any demonstration of this type. He is obviously going to remove the shoe on the foot on which apparently he has no toes. He has been walking around this courtroom for the past two weeks and we have even had a demonstration today. There is nothing apparently

wrong with his ability to walk or run and what materiality or relevancy that would have at this time I fail to see. He is on charge, Your Honor, for killing his wife, and I think whether or not he is missing a toe or not has no bearing in that regard.

[1503]

(Reporter's Transcript, p. 1549, line 25, through p. 1554, line 7):

*Cross-examination*

By Mr. Grinnell:

Q. Mr. Atchley, I want to ask you a few prelimi-

[1549]

nary questions. As I understand it from your testimony you are at the present time 43 years old?

A. No, sir, I am 41 going on 42.

Q. You are going on 42?

A. Correct.

Q. Very well. And you came to California, at one time in your testimony, it seemed '45 or '46, then I heard another date mentioned of 1943. Now, can we clear that up at this time as to just about when it was that you did come to California?

A. Oh, it was in '43.

Q. It was?

A. I am pretty sure.

Q. You are pretty sure of that?

A. Yes.

Q. So then you have been in California some 15 years, is that correct?

A. Yes, somewhere in that neighborhood.

Q. And this is now '58. So that it hasn't been 20 or 21 years as was referred to on your direct examination yesterday, but rather some 15 years.

A. I been in California about 15.

Q. During the time you have been in California you have worked generally at a number of jobs involving farm labor work, then you became connected with the automobile business, is that correct?

A. That is correct.

Q. Generally speaking that has been since the end of World War II?

A. Yes.

Q. I believe you testified that you worked in Imperial Valley before you came up to Oroville?

A. Correct.

Q. And that after you came to Oroville you sold cars for your brother Sam who had the car business [1550]
out on the corner of the Palermo road and—what's the one that goes into the new plywood plant? Anyway, you know where I mean?

A. I know where you mean.

Q. So then you might say that you have been associated with cars and in that line of work for some ten years now?

A. Well, somewheres near eight or ten years I would say.

Q. And during that period of time you had day to day contact with prospective purchasers regarding the sale of cars?

A. Yes.

Q. That has been your business, both buying and selling cars?

A. Yes.

Q. And you have also during that time had to perhaps repossess some of these cars, have you not?

A. Yes.

Q. And you have perhaps at various times during this time had to employ legal counsel in order to do that?

A. I employed—I mean, Keith Lyde at one time.

Q. And also I believe that you have employed at least Mr. Goodwin and Mr. Clewe at one time also?

A. Yes.

Q. So that have you not prior to this occasion, prior to the 1st of August, you have employed then several different attorneys in this community at various times, have you not?

A. You mean in '58?

Q. Prior to August 2nd, the time that we are talking about, prior to that time you had employed several different attorneys in this community in connection with your business?

[1551]

A. I did Mr. Clewe because you had to have a counsel representative to——

Q. The question was, did you employ these attorneys? That may be answered yes or no.

The Court: Do you understand the question?

The Witness: I don't understand.

The Court: Would you state it again please.

Mr. Grinnell: Yes, Your Honor.

Q. Prior to the death of your wife on August 3rd, 1958, ——. You recall that event rather clearly, do you not?

A. I remember about the time it was, yes.

Q. Prior to that time you had had occasions then to employ at least three attorneys in the Oroville area to represent you in various business dealings, had you not, and their names which have been mentioned a moment ago?

A. I had employment of——

Q. Just answer yes or no please. If you wish to explain it later I am sure that can be brought up. Do you understand the question?

A. I don't understand the question the way you want it.

Q. Did you employ Mr. Clewe at some time, or his office, to represent you?

A. John McDonald, if that's who you are referring to.

Q. Or his office. And he certainly is working in the firm of Clewe, Blade and McDonald, is he not?

A. Well, probably so.

[1552]

Q. And also you have employed Mr. Lyde you said?

A. Previous.

Q. That is what we are talking about.

A. For repossessing.

Q. I don't care what it was for. I am just asking you if you did.

A. Yes.

Q. And you also employed Mr. Goodwin, Norris Goodwin?

A. Yes.

Q. So then we can say you knew at least three attorneys in the community from prior business experience prior to the date of your wife's death, is that correct?

A. Yes.

Q. Now, generally speaking, when did you go out of business? By that I mean, referring to the used car business.

A. Well, I couldn't say definitely. I closed up the car lot in the last part of '57.

Q. Would that be you turned your license in at that time, is that correct?

A. Correct.

Q. So that would be somewhere in December of '57?

A. Well, somewhere in that.

Q. That you ceased—turned in your license to sell cars at the Department of Motor Vehicles and went out of business? Is that correct?

A. Correct.

Q. The used car business. Now, why did you go out of the used car business?

A. Well, I couldn't go out and talk to the public on account of my wife.

Q. I see. Now, is it not true, Mr. Atchley, that during the times that you were in business that you

[1553]

were relatively successful financially?

A. Yes.

Q. And may we say that you perhaps earned somewhere between eight and thirteen thousand dollars a year?

A. Well, I would say approximately.

Q. So that this was then by our standards a successful business?

A. Well, by my standard it would be, yes.

[1554]

(Reporter's Transcript, p. 1614, lines 3-26):

Q. Oh, you didn't realize what you were saying, is that correct, you didn't realize what you were saying?

A. That is what I said.

Q. And what had caused this great shock to your nervous system?

A. Well, I would say my wife, that is what I would say that caused it.

Q. You mean the fact you just shot your wife?

A. Yes, I didn't shoot her, it was accidentally scuffling over the gun.

Q. The officers showed you a box of shells recovered from a locker, foot locker, did they not? And I am holding the box up at this time.

A. I don't remember whether they did or not, I won't say, Mr. Mizell.

Q. Didn't you tell the officers you have never purchased any bullets, any 22 bullets prior to the time they showed you this box?

A. I might have, I don't know.

Q. Now when they showed you this box you told them you had purchased this box for the rifle you had sold to Mr. DeCamp?

A. I might have told them that.

Q. Don't you recall that?

A. No, I don't recall it but I might have told them, I will say it that a way.

Q. Did you load the gun which killed your wife from this box of shells?

A. I don't know whether it was that box or not, I couldn't swear to that, if it is the box that come out of my foot locker I did.

[1614]

(Reporter's Transcript, p. 1624, lines 1-25):

A. I didn't—I had been up about 48 hours, Mr. Manzell [sic] and I was in the highest shock, how would a man know.

Q. Well, did you not at that time tell him that you had not gone into this little shed?

A. I might have told him that.

Q. Didn't he tell you that they had found your shorts outside the bedroom window, the bathroom window, where you had thrown them and did you not at that time tell him that anything in that regard had happened right at your place in Palermo?

A. I don't remember, might have.

Q. In other words if you told him that you had not had this call of nature in Gridley, but rather at your home in Palermo and thrown them out the window because you lacked any toilet paper in the house, was that true or untrue?

A. That might have been true, Mr. Mizell, I don't know, I don't remember, but I could have said it, yes.

Q. And if you said it was it true or untrue?

A. It was true if I said it I guess.

Q. It was true, you did this at your home in Palermo?

A. I don't remember but if I said it I guess it is.

Q. Did you have it in the shed or at home?

A. Well, I went in the shed over there, I did that.

Q. But if you told Mr. Lyde you had not gone in the shed but rather this had happened in your house at home then that was not true, was it?

A. I don't know, I don't remember.

[1624]

(Reporter's Transcript, p. 1628, line 2 through p. 1629, line 9):

Q. I see, so you got up a couple of hours earlier then?

A. That is correct.

Q. But you did get to bed somewhere around midnight?

A. Somewhere around midnight.

Q. And then the next day you pursued your normal activities, you went to various places that you testified in the evening, saw the different people and took these boys home somewhere around 12:30 that night, is that correct?

A. Well, I would say somewhere around that time.

Q. And then of course you went on to Gridley although we didn't know that at that time.

A. No.

Q. So that you did, the only sleep that you got Saturday night would be the hour after you returned home and before the officers arrived?

A. I didn't sleep any.

Q. You didn't sleep any?

A. No, sir.

Q. And then you were brought in and questioned and we have gone over that and then you were allowed to rest and go to sleep, were you not?

A. If you call it rest and sleep to put you down there in a concrete place with a little old thin mattress down there and just a toilet stuck in there, no place to wash yourself or anything, if you call that a good place to go to sleep, I guess so.

Q. And then after you were questioned by Mr. Lyde in the morning you went back and went to sleep again, did you not?

A. No, I did not.

[1628]

Q. Well, then, you didn't complain about sleeping through breakfast?

A. The breakfast they brought it, brought something back there and I told them I didn't want it, I didn't feel like I needed it or didn't want it.

Q. You are quite certain you did not complain to the officers because they hadn't woke you up for breakfast?

A. Well, I never was asleep and the trustees come back by there and talked to me such as Clyde Brown and brung coffee back there, I don't know.

[1629]

(Reporter's Transcript p. 1639, line 26 through p. 1644, line 25):

Q. And when you found your wife was not home—my question a moment ago was, "That upset you, did it not?"?

[1639]

A. No, sir.

Q. Then why did your return to Oroville?

A. I returned to Oroville to see where she was at.

Q. You were going to find her, catch her with this other man, weren't you?

A. Well, I been told and her daughter had told me that she been out with other men.

Q. That was your intention that night, was to catch her with another man?

A. That was my intentions, for me not going over there at 8:00 o'clock naturally.

Q. Now, isn't it true, Mr. Atchley, that you did not have the gun when you first went to Gridley?

A. I had the gun all the time, all that day, in the car, as I told you, counsel.

Q. I am calling your attention—— Counsel, you may follow me at page 47 of his record.

Mr. King: Thank you. Just a moment, counsel. Which line please?

Mr. Grinnell: Line 10. The question by Mr. Travers:

"Q. There is one point I should put in there too, Jack. What did you have the gun—what did you have the gun for in the first place?

"A. Well, I didn't have it. I went over there, see. I didn't have it when I first went over there, and so I went back and got it and put it in my belt."

A. It was in the car, counsel.

[1640]

Q. Then this statement on the tape is true or untrue?

A. It is true, but the gun was in the car, counsel.

Q. (Reading:)

"Q. There is one point I should put in there too, Jack. What did you have the gun for in the first place?

"A. Well, I didn't have it. I went over there, see. I didn't have it when I first went over there. And so I went back and got it and put it in my belt."

A. That was in the glove compartment of the car.

Q. Isn't it true, Mr. Atchley, that you went over there, found your wife gone, went back to Oroville, got the gun, put it in the incinerator or trash barrel just as you said?

A. No, sir.

Q. Went back over there with the gun with the avowed intention of waiting for your wife to come home?

A. No, sir. I had the gun all the time, as I have told you all the way through. The gun had not been out of the car in a week before that.

Q. Then this statement which this jury heard, which we all heard with our own ears and your voice, is true or untrue?

A. It is true excepting the gun was in the glove compartment of the car. I didn't go back home to get no gun, counsel.

Q. Is the statement, "I didn't have it when I first went over there and so I went back and got it and put it in my belt," is that true?

A. Did I go to the house and get it, counsel? I said no, it was in the glove compartment of the car.

[1641]

Q. Then why would you say, "I didn't have it when I first went over there"?

A. It was in the glove compartment of the car. I didn't carry it down there with me the first time I went down to the house, counsel.

Q. It was in the car?

A. It was in the car.

Q. You just had not carried it from the car to the house?

A. That is correct, counsel.

Q. You were or were not upset because you did or did not find your wife home when you went by to check on her?

A. No, sir. Counsel, I had been to her home many a time at 2:30 in the morning and 2:00 o'clock in the morning and I had my gun with me.

Q. Did you take your gun with you that evening because you were afraid of her?

A. The gun was in the glove compartment of my car that evening, yes, counsel.

Q. Did you take the gun to Gridley because you were afraid of your wife?

A. Well, I had been afraid of my wife at times, yes, but as far as me taking my gun over there to kill her I did not, counsel.

Q. You took the gun to Gridley as you have stated in your direct statement, because you wanted to scare someone?

A. I had scared the man off if he would have been there, if I would have caught him coming up there.

Q. That brings up another interesting point. Did you ever tell anyone other than perhaps your attorney that there was another man that came home with

[1642]

her that evening?

A. Not as I remember, counsel.

Q. And you were asked that question specifically, were you not?

A. You asked me to come over there and drilled me one whole evening and I wouldn't tell you.

Q. You wouldn't tell me?

A. I told you the man——.

Q. It is true then that you wouldn't tell me whether she came home with someone or not?

A. I told you that she came home with somebody, didn't I?

Q. Did you?

A. Didn't I tell you there was a man there?

Q. Did you?

A. Yes.

Q. It is your testimony that you told me?

A. That was about two or three weeks ago.

Q. Two or three weeks ago?

A. Or whenever it was.

Q. Other than myself two or three weeks ago and your attorney did you tell anyone else she came home with anyone?

A. Not as I remember.

Q. Isn't it true that you have claimed at all times, until two or three weeks ago, that she came home alone?

A. No.

Q. It is not true?

A. No.

Q. All right. I am going to ask you first about your statement to Mr. Travers.

Once again, counsel, I am referring to line 48 of the transcript of Mr. Travers'——

Mr. King: What page please?

[1643]

Mr. Grinnell: Page 48.

Mr. King: What line?

Mr. Grinnell: Line 4.

(Reading:)

"Q. And you had put the gun in your belt. Did you make an attempt to pull the gun or anything?

"A. No, sir. When I see nobody but her I didn't make no effort whatever."

A. Well, I didn't see nobody but her at that time, counsel.

Q. Then it is your——

A. It is my——

Q. It is your statement at this time that when you made this statement you meant that you saw nobody but her when you were wrestling over the gun?

A. When we was wrestling over the gun the gun went off, counsel, I seen somebody through the glasses of the car standing on the other side of the car.

Q. In any event I will find it later. You did not. In any event, for the time being, in all fairness, I am laying the basis for impeachment, Mr. Atchley. You can not recall telling the officers at any time that she was alone when she came home?

A. I don't remember anything about it, counsel. At that time the only time I remembered it is when we was scuffling over the gun and the gun went off and I seen the gentleman through the glass of the car

is the only thing that I can swear to right now at the present time.

[1644]

(Reporter's Transcript, p. 1676, line 20 through p. 1677, line 24):

Q. Could it be, Mr. Atchley, that because of the realization of what you had just done, what had just happened, the fact you were not particularly familiar with the area, having only been there on several prior occasions, could it be, Mr. Atchley, as you rushed out the gate, or backed out the gate that you inadvertently turned south on Nevada Street for a few steps, a short distance, maybe down past the driveway or somewhere in that area in the proximity of Mrs. Ed-

[1676]

singer's house and then realizing that you were proceeding in the wrong direction turned around and walked back in the direction of your car?

A. No, sir.

Q. You weren't in that great a shock?

A. I wasn't, I didn't go that a way, I went north.

Q. However, you have testified that this incident shocked you greatly?

A. Yes.

Q. And as I understand from your examination Wednesday you made no attempt to call an attorney or the police either before leaving Gridley or upon arriving home after the shooting?

A. I was aiming to call an attorney that morning and give him the gun and let him fingerprint the gun just exactly like I said, and didn't get no opportunity to do it.

Q. You realized when you left the front yard that your wife was dead?

A. I looked down at her and I figured she was dead, yes.

Q. You knew at that time that it was serious, did you not?

A. Yes.

Q. But you made no attempt or effort at that time to contact anyone about that, did you?

A. As I said I asked for counsel about eight or ten times when I got down here where I could tell the truth and nothing but the truth and your'ns wouldn't give me one.

[1677]

(Reporter's Transcript, p. 1693, line 1 through p. 1694, line 3):

"Q. Where did she take the gun out of?

"A. She got it out of the car when she come out of the car.

"Q. She got out of the car, parked the car in the carport there?

"A. When she come around there, the gate of the fence, seen the gun in her hand, and I stayed back against the corner of the house."

Q. Now, do you recall——

A. I don't remember too much about that.

Q. If you did state that earlier was that true or untrue?

A. Well, as I say, I might have said anything to get them to quit questioning me and let me go to bed and sleep. I might have said anything. I don't remember.

Q. If you said it was it true or untrue?

A. Untrue.

Q. It was untrue. Of course, although counsel didn't object, the question was, you were all steamed up over your wife being out with another man and also that she actually had come home with a gun. Both of those statements you are now claiming if you said them were untrue?

A. Yes.

Q. Now, I believe that just before the recess I was—I asked you about this conversation that apparently took place as you two met on the sidewalk that early Sunday morning of August 3rd when you inquired, "Honey, where you been so late?" And she replied, "None of your goddamn business." Now, I can't find the exact spot. I'll find it later. Do you recall telling anyone immediately after this event that you couldn't recall anything that was said by either one of you as you met that early morning?

[1693]

A. I don't remember.

Q. You don't recall whether you said that or not?

A. No, sir.

[1694]

(Reporter's Transcript, p. 2690, lines 5-24):

Mr. Mulkey: At this time, Your Honor, the People will offer in this proceeding all of the evidence, transcripts and proceedings heretofore had in the trial in chief before this jury, and on that evidence we will rest our case.

The Court: Mr. Mulkey, I think the motion should be that you offer in evidence all of the evidence here-

tofore admitted in the case.

Mr. Mulkey: Yes, Your Honor.

The Court: Not the transcripts. They are incomplete and they have not been proofread.

Mr. Mulkey: I refer to as contained in the transcripts. Just offering the evidence physical and testimonial that has heretofore been received.

The Court: The motion is granted and all of the evidence whether it is oral or paper or whatever it may be, the exhibits, are admitted in evidence for the purpose of this further proceeding.

Do the People rest?

Mr. Mulkey: Yes, Your Honor, the People rest.

The Court: All right. The defendant may proceed.

[2690]

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# In the Supreme Court
OF THE
# United States

SE NOT PRINTED

OCTOBER TERM, 1969

No. 69-44

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California,

*Petitioner,*

vs.

VERON ATCHLEY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1969

No.

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California,
*Petitioner,*

vs.

VERON ATCHLEY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 27, 1969.

## CITATIONS TO OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of California, printed in Appendix A hereto, is reported at ____ F. Supp. ____. The Court of Appeals' per curiam majority opinion, and Judge Barnes' dissent thereto, are printed in Appendix B hereto, and reported at ____ F.2d ____.

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## JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1969 and our petition for rehearing was denied on June 26, 1969. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

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## QUESTIONS PRESENTED

I. Is it proper for a federal district court which cannot say that a confession was involuntary to grant relief on habeas corpus ten years after this very question had been litigated and resolved against petitioner in the state trial court whose decision was affirmed by a unanimous state supreme court and reviewed by this Court?

II. Can a federal district court compel the state courts to act beyond their jurisdiction by invoking the "procedure of convenience" outlined in *Jackson v. Denno* 378 U.S. 368 (1964).

## STATUTE INVOLVED

This petition concerns the proper interpretation of Title 28, United States Code, section 2254(d) which is set forth in Appendix C, *infra.*

---

## STATEMENT OF THE CASE

### A. Proceedings in State courts.

Veron Atchley was convicted after a jury trial of the first degree murder of his wife, and the death penalty was imposed. Upon appeal to the California Supreme Court his conviction was affirmed in an opinion set forth in Appendix D, *infra.* Subsequently the Governor commuted Atchley's sentence to life imprisonment with eligibility for parole.

### B. Proceedings in Federal courts.

Atchley's petition to this Court for a writ of certiorari was granted. However this Court stated:

> "After hearing oral argument and fully examining the record, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed." *Atchey v. California,* 366 U.S. 207, 6 L.Ed.2d 233 (1961).[1]

He then unsuccessfully petitioned the United States District Court for the Northern District of California

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[1]Petitioner recognizes the general rule that a denial of certiorari is not entitled to persuasive effect in subsequent proceedings [*Brown v. Allen,* 344 U.S. 443, 489-497 (1953)]. However, where as in this case certiorari is withdrawn as having been improvidently granted after briefs were filed and argument heard it must be presumed that the record did not manifest any unfairness at the hearing on the issue of the voluntariness of Atchley's statement.

for a writ of habeas corpus. The district court's denial of that petition was affirmed on appeal. *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

The instant proceedings commenced when a petition for a writ of habeas corpus was filed in the District Court for the Northern District of California on March 10, 1967. An order to show cause issued, counsel was appointed and a supplemental return and traverse were filed. The district court ordered that petitioner be released from custody unless the state affords Atchley either a hearing on the issue of the voluntariness of his confession or a new trial. *Atchley v. Wilson,* ..... F.Supp. ....., Appendix A. We appealed to the Court of Appeals for the Ninth Circuit which in a per curiam opinion affirmed the order of the district court. Judge Barnes dissented. *Wilson v. Atchley,* ..... F.2d ..... (9th Cir. 1969).

---

**STATEMENT OF FACTS**

At approximately 2:30 a.m. on the morning of August 3, 1958, Atchley murdered his estranged wife by shooting her six times after lying in wait at her home. Following the shooting he returned to his residence where he was arrested at approximately 4:00 a.m. From the jail Atchley phoned R. J. Travers, his friend and insurance agent who, in accordance with Atchley's request, visited him on the morning of August 5, 1958. At this time Atchley recounted the events surrounding the shooting to Travers. As he was leaving the jail, Travers informed the authorities of the

nature of this conversation and acceded to their request that they be allowed to record the conversation Travers had already arranged to have with Atchley that afternoon.

Before allowing the introduction of a tape recording of this conversation, the trial judge held a hearing in chambers, listened to the tape recording and heard arguments respecting its admissibilty. Objections were made that the statements on the tape recording were not voluntary and were inadmissible because Atchley, when making these statements, was unaware that they were being recorded or that Travers had been requested by Sheriff Spann to elicit them. The trial court ruled that the prosecution would have to establish the same foundation required for the admission of a confession in order to have this recording admitted into evidence.[2]

In the presence of the jury additional evidence was taken on the voluntariness of the conversation and the

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[2]At this time California followed the "Massachusetts" procedure for the admission of confessions. The prosecution had the burden of establishing that a confession was voluntary [*People v. Trout*, 54 Cal.2d 576, 583, 354 P.2d 231, 235 (1960); *People v. Berve*, 51 Cal.2d 286, 291, 332 P.2d 97, 99 (1958)]. If the defense offered evidence to controvert the prosecution's, the trial judge had to exclude the confession if he found it had been improperly obtained. If however, the trial judge found the confession to be voluntary it was introduced into evidence.

If the evidence concerning the circumstances surrounding the confession was in conflict [*People v. Bevins*, 54 Cal.2d 71, 77, 351 P.2d 776, 780 (1960)] the jury had to be instructed to disregard any confession they believed was not properly obtained [*People v. Baldwin*, 42 Cal.2d 858, 866, 270 P.2d 1028, 1033 (1954); *People v. Gonzales*, 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944)]. Where, as in this case, there was no conflict in the evidence as to the circumstances surrounding the confession its admissibility was of course a question of law resolved by the trial court when it admitted the confession into evidence.

tape recording was subsequently admitted. Travers testified that on the evening of August 4, 1958, Atchley had requested that he visit him in jail in order to replenish Atchley's supply of cigarettes and talk about an insurance policy on the life of the deceased. Of this initial conversation, Travers said:

> "Mr. Atchley brought the subject [of the homicide] up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time." (RT 1008).

Travers testified that prior to this initial conversation with Atchley he had not been asked by the police to interrogate him about the shooting. He also stated that the first conversation and the tape recorded one were just about the same except that he asked more questions the second time.

Following the initial conversation with Atchley, Travers informed Sheriff Spann what Atchley had told him and advised the officer that he had arranged to return later in order to secure further information from Atchley for his insurance company. In response to Spann's request Travers agreed to allow the officers to record his subsequent conversation with respondent. Travers made no threats nor offered any inducements to secure the statements made during the recorded conversation which Atchley acknowledged he understood would have to be reported to the insurance company.

## REASONS FOR GRANTING WRIT

### I

### THIS WRIT SHOULD BE GRANTED IN ORDER TO CLARIFY RECENT AMENDMENTS TO TITLE 28, UNITED STATES CODE, SECTION 2254, WHICH WERE DESIGNED TO PREVENT THE ABUSE OF THE FEDERAL WRIT OF HABEAS CORPUS BY STATE PRISONERS.

In the instant case petitioner has parleyed the passage of eleven years and the uncertainty of a federal district court to put the People of the State of California in an impossible situation. At the pain of setting at large a convicted murderer who at one time was sentenced to death, we are compelled, long after memories have dimmed and the facts have become stale, to provide an evidentiary hearing on an issue of fact which was long ago decided by the state trial court, a uninamous state supreme court and examined by this Court.

However, it is not merely the outcome of this individual case which compels us to petition this Court to review a decision favorable to a habeas corpus petitioner. We make this petition because this is the very situation Congress intended to prevent by enacting Public Law 89-711 in 1966 which amended Title 28, United States Code, section 2254. This case is symptomatic of the problems arising from the current administration of federal habeas corpus review which fails to give effect to the intent of Congress and has led to more drastic proposals concerning the Habeas Corpus Act. We submit that the instant case provides an opportunity for this Court to resolve the current problems arising from the administration of federal

habeas corpus which, if allowed to fester, will ultimately be resolved by Congress.

In *Townsend v. Sain,* 372 U.S. 293 (1963), this Court held that the lower district courts must hold an evidentiary hearing on habeas corpus petitons filed by state prisoners where the state proceedings had not provided a full and fair evidentiary hearing on the issue. This Court announced guidelines for the lower courts to consider in determining whether an evidentiary hearing was required in a given case. Under those guidelines a hearing was necessary where: (1) the merits were not resolved in the state court proceedings; (2) the factual determinations made in the state court proceedings were not fairly supported by the record; (3) the procedure employed in the state court was inadequate to a full and fair hearing; (4) there was a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed; (6) the state did not afford a full and fair hearing. *Townsend v. Sain, supra* at 313-318. Title 28, United States Code, section 2254(d) codifies most of the guidelines laid down in *Townsend v. Sain* with one notable exception, "newly discovered evidence" was specifically deleted from the conditions which a petitioner must prove to attack the presumptive validity of a state court finding.

The enactment of section 2254(d) worked a badly needed reform, one of whose purposes was to reduce the rising friction between state and federal judicial systems. *Johnson v. Florida,* 283 F.Supp. 494, 497 (S.D. Fla. 1968). The failure of the federal district

courts to give the effect to this amendment intended by Congress has led to more drastic proposals for legislative reform in this area. The "Omnibus Crime Control and Safe Streets Bill of 1968" was reported from Senate Committee with amendments to Title 28 United States Code, designed to "relieve the federal courts from the growing practice of convicted persons using habeas corpus as a substitute for direct appeal." 1968 U.S. Cong. & Adm. News, Vol. II, p. 2113. The bill contained provisions removing jurisdiction from the federal courts to reverse state cases involving admissions and confessions introduced into evidence as voluntarily given where the highest court of the state had affirmed their admission into evidence. 1968 U.S. Cong. & Adm. News, Vol. II, p. 2123. The committee report stated in pertinent part:

> "While recognizing that some issues raised in state cases do present federal questions, the committee feels that there are other legal questions heretofore deemed reviewable as a federal question that should be finally decided on the state level, free from federal interference. One of these questions is whether, as a factual matter, the confession was voluntarily given. This is a question of fact—not one of law—and should be decided on the trial level. The decision of the trial judge on the question of voluntariness is reviewed by the respective state appellate court and is generally affirmed if it is supported by substantial evidence. At this stage of the proceeding, exercise of jurisdiction by federal courts is disruptive and tends to dilute the state's enforcement of its criminal laws. To counteract this disruptive practice, title II limits federal jurisdiction to review a

state court's final decision as to voluntariness of a confession as follows:

> 'Neither the Supreme Court nor any inferior court ordained and established by Congress under Article III of the Constitution of the United States shall have jurisdiction to review or to reverse, vacate, modify, or to disturb in any way, a ruling of any trial court of any state in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of an accused if such ruling has been affirmed or otherwise upheld by the highest court of the state having appellate jurisdiction of the cause.'" 1968 U.S. Cong. & Adm. News, Vol. II, p. 2138-2139.

Thus, in order to alleviate the problems created by the use of the federal habeas corpus procedures to relitigate questions which were raised at trial or on appeal the committee recommended that Congress enact legislation providing that state court decisions on the admissibility of statements be reviewed by federal courts only on appeal or by writ of certiorari. 1968 U.S. Cong. & Adm. News, Vol. II, p. 2152.

Although as enacted the "Omnibus Crime Control of Safe Streets Act of 1968" deleted these provisions, their proposal illustrates a continuing concern on the part of the Congress with federal review of state convictions. If the reforms intended by the 1966 amendments to Title 28 United States Code, section 2254, are frustrated, as they were in the instant case, then reforms along the lines purposed by Title II of the "Omnibus Crime Bill of 1968" will undoubtedly gain favor.

Title 28, United States Code, section 2254 as amended in 1966, establishes a qualified application of the doctrine of res judicata to federal habeas corpus proceedings brought by state prisoners by according a presumption of correctness to factual determinations made at a hearing on the merits in the state courts. The burden of establishing an exception to this presumed validity requires petitioner to show, by convincing evidence, that the factual determination of the state court was erroneous. 1966 U.S. Cong. & Adm. News, Vol. II pp. 3666-67.

The California Supreme Court reviewed the admissibility of Atchley's statements noting particularly Travers' testimony that no threats had been made nor any inducements offered and during the initial conversation Atchley had volunteered, without being questioned, substantially the same statements as those given in the later tape recorded conversation. At no time during the trial did Atchley contradict Travers' testimony or suggest that any of his recorded statements were untrue. The California Supreme Court found "substantial and uncontradicted evidence that no coercion occurred," *People v. Atchley,* 53 Cal.2d 160, 170-171; 346 P.2d 764, 769 (1959); even though Travers had referred to an insurance policy during the recorded conversation—a deception similar to that condemned in *Leyra v. Denno,* 347 U.S. 556 (1954)—he did so only to explain why he was asking questions and not to induce any particular responses. That court held that since there was no mental coercion comparable to that in *Leyra,* the deception itself did not render Atchley's statements inadmissible since it

was not a type reasonably likely to procure an untrue statement.

The trial court's admission of Atchley's statement over objections to its voluntariness was "A determination after a hearing on the merits of a factual issue," and thus entitled to the presumption of validity conferred by Title 28, United States Code, section 2254(d). Further, the unanimous opinion of the California Supreme Court upon the very issue being litigated herein after a full review of the trial record is likewise entitled to a presumption of validity. As Judge Barnes noted in his dissenting opinion, Appendix B, pp. 14-15, the California Supreme Court specifically recognized in their opinion that Atchley's statement would be inadmissible if made involuntarily. *People v. Atchley,* 53 Cal.2d 160 at 170-171, 346 P.2d 764 at 769. The State Supreme Court, within the meaning of 28 United States Code, section 2254(d), found that there was a hearing on the admissibility of these statements outside the presence of the jury prior to any ruling on their admissibility and that any exclusion of evidence regarding Atchley's mental condition was either harmless error or such evidence was not offered. And, the California Supreme Court found there was "substantial and uncontradicted evidence that no coercion occurred." *Ibid.*

Contrary to these specific findings of the state court which were entitled to the presumption of validity, the district court held that under the rule announced by this Court in *Jackson v. Denno,* 378 U.S. 368 (1964), there was no reliable determination on the

issue of the voluntariness of this confession. Unless the lower federal courts are compelled to detail the factual showings by which petitioners can be said to have rebutted the presumption of validity contained in 28 United States Code, section 2254(d), that presumption is meaningless and the reforms sought by that section will be frustrated.

The district court was of the opinion that the *trial court* erred in refusing to hear evidence during the in chambers hearing on the voluntariness of Atchley's statement.[3] (See Appendix A, pp. 7-9). Based upon these findings the district court held there had not been an adequate development of the material facts [§ 2254(d)(3)] which rendered the finding of voluntariness devoid of support in the record [§ 2254(d)(8)] thus rebutting the presumption of validity established by Title 28, United States Code, section 2254(d).

Most of the evidence Atchley sought to present on the issue of voluntariness at the in chambers hearing was eventually heard by the jury and was contained in the record reviewed by the California Supreme Court. That court was also confronted with the con-

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[3]The district court held the trial court erred in five instances by not receiving evidence at the in chambers hearing. Discussed individually *infra*, those instances are:

(1) that petitioner had communicated with the police his desire to have an attorney; (2) that Travers feigned sympathy for his friend and deceived him about his motives in questioning him; (3) that petitioner did not know the statement was being tape recorded; (4) what the officers had said to Travers before the tape recorded statements were elicited; and (5) what was petitioner's mental condition, his ability to read and write, and the extent of his education at the time the statements were taken.

tentions that the trial court erred in excluding evidence. Concerning Atchley's request for counsel prior to any conversation with Travers, the California Supreme Court had held that such evidence was material on the issue of voluntariness as early as 1951 [*People v. Stroble,* 36 Cal. 2d 615, 624-627, 226 P.2d 330, 336-338 (1951)]; however, in *Atchley's* case:

> "Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred." *People v. Atchley, supra,* 53 Cal.2d at 171, 346 P.2d at 770.

The California Supreme Court also directed itself to the contention of Travers' feigned sympathy and concluded:

> "In . . . [*Leyra v. Denno,* 347 U.S. 556 (1954)] the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. . . . Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement." *People v. Atchley, supra.*

The California Supreme Court also considered the trial court's exclusion of medical testimony as to Atchley's mental condition at the time of the shooting and concluded that no error occurred because such

evidence was never offered nor was the issue raised in the trial court. *People v. Atchley, supra,* 53 Cal.2d at 176; 346 P.2d at 773. And, if there was any error it was harmless. *People v. Atchley, supra.* Of course, considerable evidence as to Atchley's mental condition, his literacy, and the extent of his education was presented at trial and thus contained in the record reviewed by the California Supreme Court. The district court's finding of error in this regard amounts to a holding that the presumptive validity of a state court finding can be rebutted by "newly discovered evidence." As noted above, this guideline laid down in *Townsend v. Sain, supra* at 313, was specifically deleted in the enactment of Title 28 United States Code, section 2254(d), and the district court should not have invoked it.

There can be no error in the trial court's refusal to allow evidence as to whether Atchley knew his conversation with Travers was being recorded. *Lanza v. New York,* 370 U.S. 139, 143 (1962). Inmates of prisons do not have the usual array of federal and state constitutional rights guaranteed to nonincarcerated citizens, *Price v. Johnston,* 334 U.S. 266, 285 (1948); and prison authorities may subject inmates to intensive surveillance and search unimpeded by the Fourth Amendment's barrier. *Lanza v. New York, supra.*[4]

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[4]*Compare, People v. Morgan,* 197 Cal.App.2d 90, 92-94, 16 Cal.Rptr. 838, 840 (1961), *cert. denied,* 370 U.S. 965 (1962); where it was held that an electronic recording of a conversation between a country jail prisoner and his sister was not an illegal search and seizure nor an unlawful invasion of the prisoner's privacy.

The final "inadequate development of the material facts" which the district court found sufficient to overcome the presumed validity of the state court's decisions concerned the trial courts' limitation of the proposed cross-examination of the officer who requested Travers' permission to make a tape recording of any future conversations. Officer Spann was called by the prosecution prior to the introduction of the tape recording and his direct examination did not go into his conversations with Travers. Atchley requested an opportunity to cross-examine him regarding these matters prior to the introduction of the tape recording but the trial court limited the proposed cross-examination to matters covered on direct.

California and the majority of states follow the federal rule restricting cross-examination to the scope of the direct examination. Thus, the trial court properly limited the proposed cross-examination of Officer Spann. Nor did Atchley suffer any prejudice since his attorney knew he could call any of the people's witnesses as his own on direct examination and go into any matter relevant to the case.

Thus, there is no convincing evidence to support a finding that Atchley rebutted the presumed validity of either the state trial court or the state supreme court finding that his statements were voluntarily made.

## II

### THE FEDERAL DISTRICT COURT HAS ORDERED THE CALIFORNIA COURTS TO HOLD A HEARING IN EXCESS OF THEIR JURISDICTION.

Although the Federal District Court has the power to hold a hearing on the voluntariness of Atchley's statement, it has chosen to employ the "procedure of convenience" outlined in *Jackson v. Denno,* 378 U.S. 368 (1964). Hence, the state has been ordered to hold a hearing or suffer reversal of the prisoner's conviction.

We concur with the district court's conclusion that if a hearing upon the issue of voluntariness is necessary, it should be held in the state courts. However, Atchley's judgment of conviction has long since become final in the California courts. There is, at this time, no state court possessed of jurisdiction over this cause to hold the hearing envisioned by the district court's order. The necessary jurisdiction can be conferred upon a California court pursuant to its habeas corpus jurisdiction [Calif. Const., Art. VI, § 10], if an application is made at the instance of the petitioner. Cal. Pen. Code, § 1474. There is no procedure in California whereby the People can properly initiate such a hearing.

Attempts to do so in other jurisdictions have resulted in confusion and litigation.[5] We believe that

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[5]*Compare, Williams v. Beto,* 386 F.2d 16, 17-19 (5th Cir. 1967), where Williams claimed the findings of the state court after such a hearing were invalid because that court had acted without jurisdiction.

the procedure outlined in *Jackson v. Denno, supra,* should be understood to require the petitioner to commence the proceedings in the state courts where that is required to invest them with jurisdiction.

Regardless of the forum in which these hearings are held, they remain evidentiary hearings whose purpose is to resolve an issue raised on collateral attack. Hence, the burden of proof remains upon the prisoner whether he or the state initiates the hearing.

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## CONCLUSION

The question raised by this petition for certiorari concerns the underlying premise to any collateral remedy: "without a *fair* trial no person should be deprived of his liberty." "Problems of Federal Habeas Corpus," 45 F.R.D. 45, 47 (1968). The district court concluded that by present standards,[6] the hearing Atchley received in 1958 upon the issue of the voluntariness of his confession was not a "full and fair" hearing. This we submit is contrary to the purpose of Title 28 United States Code, section 2254(d) which was intended to direct the district court to consider

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[6] *Reck v. Pate,* 367 U.S. 433 (1961); *Culombe v. Connecticut,* 367 U.S. 568 (1961); *Gallegos v. Colorado,* 370 U.S. 49 (1962); and *Davis v. North Carolina,* 384 U.S. 737 (1967).

Of course these standards were the law in California at the time Atchley was tried. *See, In re Wallace,* 24 Cal.2d 923, 937, 152 P.2d 1, 3 (1944); *People v. Stroble,* 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951); *People v. Millum,* 42 Cal.2d 524, 526-528, 267 P.2d 1039, 1040 (1954); *People v. Berve,* 51 Cal.2d 286, 292, 332 P.2d 97, 100 (1958); and *People v. Speaks,* 156 Cal.App.2d 25, 36-37, 39, 319 P.2d 709, 716-719 (1957).

only if the factual determination of the state court was made at a hearing which was *fair when held.*

For the reasons expressed above, we respectfully request this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
September 23, 1969.

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**(Appendices Follow)**

## Appendix A

In the United States District Court
Northern District of California

No. 46688

Veron Atchley,
Petitioner,
vs.
Lawrence E. Wilson, Warden, California State Prison, San Quentin, California,
Respondent.

## MEMORANDUM OF DECISION ON PETITION FOR HABEAS CORPUS

Veron Atchley brings this habeas corpus petition pursuant to 28 U.S.C. § 2241 *et seq.*, to secure his release from an allegedly unconstitutional confinement in San Quentin State Prison. After having pleaded not guilty, he was convicted of first degree murder on January 7, 1959, and was sentenced to death. The California Supreme Court affirmed the conviction and sentence, *People v. Atchley,* 53 Cal. 2d 160, 346 P.2d 764 (1959). A writ of certiorari was granted but subsequently dismissed by the United States Supreme Court as having been improvidently granted. *Atchley v. California* 366 U.S. 207 (1961). Atchley's sentence was commuted to life imprisonment without possibility of parole in 1961, and was further commuted to allow parole in 1966.

In this application, petitioner primarily raises two constitutional claims. First, he argues that the procedure employed by the trial court for determining the voluntariness of petitioner's confession failed to satisfy federal constitutional standards. Secondly, he argues that the tape-recorded confession which was extracted from him was involuntary, and hence, inadmissible. At his trial and on his automatic appeal petitioner challenged the admissibility of his tape-recorded statements. Further, he alleges that all the grounds raised in this petition were presented in a habeas corpus petition to the California Supreme Court, which was denied on January 18, 1967, apparently without opinion. Under the rule announced in *Castro v. Klinger,* 373 F.2d 847 (9th Cir. 1967), petitioner has satisfied the exhaustion of remedies requirement of 28 U.S.C. § 2254 (1958), as amended 28 U.S.C. § 2254 (1966).

On March 9, 1967, an Order to Show Cause was issued by this Court. After respondent filed his return and a hearing was held, it was determined that counsel should be appointed and that a second non-evidentiary hearing should be held after further briefing by the parties. On September 28, 1967, the further hearing was held.

The facts upon which petitioner's claims are based can be briefly summarized. At Atchley's trial for the murder of his wife, the prosecution proposed to introduce a tape recording of a conversation between Atchley and one Ray J. Travers. Defense counsel requested, and the Court granted, a preliminary exami-

nation in chambers to permit defense counsel to state his objections to the introduction of the tape-recording. In chambers, the objection was made, among others, that Atchley's statements on the tape "were not given freely and voluntarily . . . " (Reporter's Transcript, Vol. IV, p. 942, l.5 hereafter cited thusly: RT., IV, 942, l.5.) Defense counsel further objected because the defendant, when making the statements, was unaware that the conversation was being secretly recorded, or that Travers had been requested to elicit Atchley's statements by the Undersheriff, Officer Spann; the objection was also raised that "the defendant was tricked into making a declaration to his insurance broker [Travers] which he felt was a private and confidential communication to his broker concerning a policy of life insurance on the decedent; that it was not given to be transcribed or taken down." (RT., IV, 942, l. 24-943, l.3.) The tape-recording was then played, in which Atchley admitted arming himself, concealing himself, watching and waiting for his wife, surprising her and firing several shots while the gun was in his hand.

At the outset of the recording, Travers told Atchley that "I won't write none of this down. I can remember. I don't want nothing on paper." (RT., IV, 951, l. 5-8; 953, l. 4-9; 954, l. 21-23.) Among other things, Atchley stated that from the time of his arrest at approximately 4:00 a.m. on August 3, until the conversation with Travers around noon on August 5, he had been kept "pretty well occupied . . . pretty well isolated." (RT., IV, 956, l. 23-24.) Further, Atch-

ley indicated that he had been trying to get an attorney before the conversation with Travers. (RT., IV, l. 4-5.)

After the tape was finished and while still in chambers, defense counsel frequently renewed his objection that the statements elicited by Travers from Atchley constituted a confession and that they were not freely and voluntarily given. In response, the prosecutor stated that he would lay a foundation showing that the statements were freely and voluntarily given. The judge ruled that the statements on the tape "may approach the nature of a confession and that therefore before the tape is used I think the same foundation should be laid as is used for the introduction of a confession." (RT., IV, 982, l. 1-3; 986, l. 5-11.)

With this in mind, two later rulings of the trial judge in chambers are significant. Defendant raised the objection that the tape contained a communication which Atchley intended to be private between himself and Travers, made for the definite purpose of helping the decedent's children, one of whom Atchley claimed was his, to recover under the decedent's life insurance policy. The trial judge ruled that such evidence would go to the weight but not to the admissibility of the tape (RT., IV, 990, l. 4-6). Secondly, defense counsel asked to recall the Undersheriff, Officer Spann, who allegedly had asked Travers to elicit the confession from Atchley, for cross-examination. The reason given was that "since this other matter has come up [presumably the voluntariness issue] . . . it would be extremely prejudicial to the defendant's

case if I were not permitted to ask him before he [the prosecution] put the insurance agent on the stand . . . " (RT., IV, 992, l. 21-26). The Court apparently ruled that the cross-examination would be limited to matters covered on direct examination (see RT., IV, 994, l. 5-8). The officer had not been examined in connection with the tape recording when he had been called earlier by the prosecution.

In the presence of the jury, at the hearing on the issue of voluntariness,[1] Travers testified that he had visited the jail in the morning of August 5 and conversed with Atchley at Atchley's request. After that conversation, Travers admitted that he was asked by the undersheriff to engage Atchley in a second conversation which would be recorded and that he complied with the request. Travers further testified that he offered no treat, promise or inducement to Atchley.

On cross-examination, Travers acknowledged that he was a good friend and the insurance agent of Atchley. At this time defense counsel indicated that Atchley was unable to read or write, although these facts were not clearly established until later in the trial when Atchley took the stand in his own defense. It was also at this time that the trial judge in effect ruled that no constitutionally impermissible inducement could have occurred from the fact that Atchley had made his statements to Travers in the belief that

[1]An examination of the Reporter's Transcript clearly shows that both counsel and the court understood the purpose of the hearing was to determine whether the tape-recorded confession had been voluntarily given. (See RT., IV, 1002, l. 18-21; 1003, l. 8-12, l. 22-24; 1004, l. 20-22; 1005, l. 8-12, l. 13-15.)

Travers, in his capacity as insurance agent, was seeking information in order to protect the rights as beneficiaries of the decedent's children (R/T., IV, 1005, l. 13-15). Moreover, when defense counsel offered to establish that Atchley had told Travers that he had requested a lawyer on numerous occasions from the sheriff's department and that he had not been permitted to talk with a lawyer prior to that time, the prosecution objected on the ground that "whether the man wanted a lawyer, had a lawyer or intended to get one has nothing to do with the freeness and voluntariness of the statement." (R/T., IV, 1009, l. 22-25). Sustaining the objection the trial judge ruled that whether Atchley "did or did not have a lawyer has no bearing on this particular point." (R/T., IV, 1010, l. 19-22). Further, the trial judge sustained another objection to questions relating to the conversation between the undersheriff and Travers on the ground that what the undersheriff Spann "may or may not have said about this man, about what he wanted him to bring out on the tape . . ." was irrelevant (R/T., IV, 1012, l. 13-19). Finally, the Court sustained an objection on the grounds of irrelevance to the question whether or not Atchley knew that the conversation was being recorded. The tape was then played before the jury, and admitted into evidence, after the trial judge noted the objections of the defendant and stated that the court had ruled upon them.[2]

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[2]The tape was also relied upon heavily by the prosecution to impeach petitioner's testimony when he took the stand in his own behalf. (See R/T., VI, 1368, 1642, 1671, 1678-82, 1725-26, and 1758.)

After the tape had been played and admitted, Travers was further cross-examined by defense counsel. At this time he admitted that Atchley didn't have a lawyer and was trying to obtain one at the time he had made the statements which were recorded. Travers further admitted that he had been a deputy sheriff for three and one-half years, with experience in "homicides and all felonies", and that in questioning Atchley, he had followed a "general routine of asking questions, as a line of interrogation . . . " (RT., IV, 1027, l. 25-1028, l. 2).

In each ruling discussed above, the trial court excluded relevant and perhaps crucial evidence on the issue of whether the confession was voluntary. Evidence that the confession was extracted while the accused was attempting to get a lawyer, had been refused a lawyer, or merely had communicated to the police his desire to have a lawyer clearly bears on whether the confession was voluntary or whether the will of the accused was overborne. *Reck v. Pate,* 367 U.S. 433 (1961); *Culombe v. Connecticut,* 367 U.S. 568 (1961).[3] Moreover, evidence that Travers feigned sympathy for his friend, Atchley, deceived him about his motives in order to extract a confession certainly would be material to the issue. *Spano v. New York,* 360 U.S. 315 (1959); *Leyra v. Denno,* 347 U.S. 556 (1954). For the same reasons, the evidence relating to whether or not Atchley knew that the tape was being recorded would also be material. Further, the

[3]Later in the trial, Atchley testified that prior to the confession, on some ten occasions, he had told the officers he wanted an attorney. (RT., VI, 1502, l. 21-1503, l. 2; VI, 1677, l. 21-24.)

testimony of Officer Spann as to what Spann said to Travers before the tape-recorded confession was elicited could be material to a determination of voluntariness based on all the circumstances. To have limited the proposed cross-examination of Spann to those matters covered in direct examination may have deprived the judge of certain facts necessary to make a competent finding. Finally, evidence relating to Atchley's mental condition, whether he was able to read or write and the extent of his education would all bear on the voluntariness of the confession. *Culombe v. Connecticut, supra; Reck v. Pate, supra, Davis v. North Carolina,* 384 U.S. 737 (1966.)[4] While the trial court did not directly exclude evidence of this nature, the prosecution objected to one question along this line on the ground that whether the defendant could read or write didn't bear on the voluntariness of the confession and in the ensuing colloquy

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[4]Later in the trial, when Atchley took the stand in his own defense, he stated that he had attended school for two or three months a year through the third grade, and that he was unable to read or write. (RT., V, 1416, l. 8-17.) He testified that immediately after his arrest, while being questioned by the local officers, he "was in the highest shock" and on the stand testified that he was unable to remember what he had told the officers during these periods of questioning. (RT., VI, 1614, l. 1; 1615, l. 4-5; 1616, l. 8-10; 1624, l. 1-2; 1627, l. 1-2.) At another point Atchley testified that during that period immediately after his arrest, "I might have said anything to get them to quit questioning me and let me go to bed and sleep." (RT., VI, 1693, l. 9-12.) Finally, when Atchley's sentence was commuted to life imprisonment without possibility of parole in 1961, the Order of Commutation notes that Atchley possessed an I.Q. of 60 and had suffered damage to his brain and central nervous system from a blow received in 1956. (Ex. A to Petition for Habeas Corpus.) Atchley's testimony in his own defense, particularly when cross-examined by the prosecutor, reveals a subnormal level of intelligence and understanding.

the response to that question was never obtained. (See RT., IV, 1002, l. 12-1004, l. 25.)

All this is not to say that this Court is presently able to say that the confession was involuntary. However, had the trial court developed the facts discussed above and other facts,[5] resolved the conflicts and discrepancies in the evidence, and engaged in the necessary close scrutiny of the totality of the circumstances under whch the confession was extracted, (*Gallegos v. Colorado,* 370 U.S. 49, 52, 55 (1962)), then the trial court could have more competently determined whether Atchley's will was overborne.

In light of the above discussion, it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary. The hearing on voluntariness was not "fully adequate to insure a reliable and clear-cut judicial determination of the voluntariness of the confession", as required by *Jackson v. Denno,* 378 U.S. 368, at 391 (1964). In that case, the Supreme Court held that the trial court procedure employed did not afford a reliable determination of the voluntariness of the confession offered in evidence, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession, and therefore would

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[5]For example, there is no indication from the record, nor was it a subject of inquiry during the hearing on voluntariness, whether the police advised Atchley of his right to remain silent, that his answers might be used against him, or of his right respecting counsel. In *Davis v. North Carolina,* 384 U.S. 737, at 740 (1966) the Supreme Court stated that such information "is a significant factor in considering the voluntariness of statements later made."

not withstand attack under the Due Process Clause of the Fourteenth Amendment. The Court therein stated, at 380, that "[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." The Court stated that the procedure to be followed must be "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." (378 U.S. at 391.)[6]

Assuming that the trial court made an independent determination that the confession was voluntary[7] as

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[6]There appears to be no question that the rule enunciated in *Jackson v. Denno* is to be applied retroactively; that is, to convictions, such as Atchley's, which had become "final" in the sense that the ordinary methods of review, such as appeal or certiorari had already become exhausted or the right to utilize them had expired through passage of time, before *Jackson* was decided. *Linkletter v. Walker*, 381 U.S. 618, 639, n. 20 (1965); *Johnson v. New Jersey*, 384 U.S. 719, 727-28 (1966); *Pinto v. Pierce*, ..... U.S. ....., 19 L.Ed. 2d 31 (1967); see Annot., "Retroactive or Merely Prospective Operation of New Rule Adopted by Court in Overruling Precedent—Federal Cases", 14 L.Ed. 2d 992, 1011-12 (1966).

[7]The record here is confusing as to exactly when the trial court made its determination that the confession was voluntary. Certainly that determination does not appear with the "unmistakable clarity" required by *Sims v. Georgia*, 385 U.S. 538, 17 L.Ed. 2d 593, at 598 (1967). Moreover, the record is clouded by the uncertainty in the trial court's statements as to whether Atchley's statements constituted a confession or merely admissions. This confusion is heightened by the fact that no instructions were given to the jury regarding the confession or the jury's role in viewing the confession. Prior to the adoption of the new Evidence Code by California, effective January 1, 1967, the failure to give appropriate instructions regarding the jury's role in viewing confessions constituted reversible error. See *People v. Bevins*, 54 C.2d 71, 76-77, 4 Cal.Rptr. 504, 351 P.2d 776 (1960).

required by *Jackson v. Denno, supra,* the fact that the hearing on the issue of voluntariness was held in front of the jury would raise no constitutional question. *Pinto v. Pierce,* ..... U.S. ....., 19 L.Ed 2d 31 (1967). However, for the reasons given above, the procedure used and the standards followed by the trial court did not satisfy the requirements of *Jackson v. Denno, supra;* see *Mitchell v. Stevens,* 353 F.2d 129 (8th Cir. 1965). As the Supreme Court stated in *Boles v. Stevenson,* 379 U.S. 43, at 45 (1964), in a case following *Jackson v. Denno,* petitioner "is entitled to a hearing in the state courts under appropriate procedures and standards designed to insure a full and adequate resolution of this issue." Accordingly, the writ of habeas corpus is granted unless the State, within a reasonable time, affords Atchley either a hearing on the issue of voluntariness which is consistent with the requirements of due process or a new trial, failing which Atchley is entitled to his release.[8] If it should be determined on a subsequent hearing that Atchley's confession was involuntary, then the State would be required to afford Atchley a new trial. *Jackson v. Denno,* 378 U.S. 368, 394 (1964). Because of this holding, the Court need not decide the other is-

[8]Alternatively, this Court concludes that, as has been shown, the trial court followed an erroneous standard of law in determining that the confession was voluntary. The remedy set forth above is still appropriate. See *Jackson v. Denno,* 378 U.S. 368, 394 n. 22 (1964). Under either theory, the Court is of the opinion that petitioner has successfully rebutted the presumption contained in 28 U.S.C. § 2254(d), as amended by Public Law 89-711, 80 Stat. 1104 (1966).

sues advanced by petitioner in his application for the writ of habeas corpus.

So Ordered.

Dated: January 19, 1968.

Robert F. Peckham,
United States District Judge.

Filed January 22, 1968,
James P. Welsh, Clerk.

## Appendix B

United States Court of Appeals
for the Ninth Circuit

| | |
|---|---|
| Lawrence E. Wilson, Warden,<br>Appellant,<br>vs.<br>Veron Atchley,<br>Appellee. | No. 22,735 |

[May 27, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES, HAMLEY, and BROWNING, Circuit Judges

PER CURIAM:

The judgment is affirmed for the reasons stated in the district court's opinion, ..... F.Supp. ..... (N.D. Calif. 1968).

BARNES, Circuit Judge, dissenting:

Appellant was a petitioning state prisoner in the court below. He had been convicted of first degree murder and sentenced to death. The California Supreme Court affirmed the conviction and sentence. (53 Cal.2d 160, 346 P.2d 764 (1959).) Certiorari to the Supreme Court of the United States was granted, and

then dismissed as improvidently granted. (366 U.S. 207 (1961).) Appellant's sentence was later commuted to life imprisonment without possibility of parole in 1961, and was further commuted to allow parole in 1966. Appellant petitioned the United States courts for a writ of habeas corpus. This was denied, without a hearing, and the denial affirmed upon the ground there was no lack of due process. *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

This is an appeal, therefore, from a second petition for a writ of habeas corpus based on the claim (1) petitioner's confession was improperly admitted into evidence; (2) the trial court erroneously excluded evidence as to petitioner's mental condition; (3) that no hearing was held outside the jury's presence to determine the admissibility of petitioner's extra-judicial statement.

The Supreme Court of California specifically recognized the general rule of the inadmissibility of confessions, or any statement made by the accused relative to the offense charged, if made involuntarily. It passed upon the admission of appellant's "implicating statement" by stating:

> "The People contend, however, that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evidence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any

of his recorded statements were untrue. Moreover the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

"Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra v. Denno,* 347 U.S. 556 [74 S.Ct. 716, 98 L.Ed 948]. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due proces, largely because they were the product of 'mental coercion.' [footnote omitted] Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not a type reasonably likely to procure an untrue statement. (*People v. Connelly,* 195 Cal. 584, 597, [234 P. 374]; *People v. Castello,* 194 Cal. 595, 602 [229 P. 855].)" 52 Cal.2d 160 at 170-171.

Thus we see there was an in-chambers hearing of the tape recording, outside the presence of the jury,

prior to any ruling by the state trial judge on admissibility.

Likewise, the California Supreme Court had before it, and considered, the second error listed above—the exclusion of medical testimony as to defendant's mental condition at the time of the shooting. The court concluded this was not error because never offered or raised below. *Id.*, p. 176, Key ¶ 20. The harmless error found by the Supreme Court of California in the exclusion of certain expert opinion testimony was with respect to defendant's reflexes and memory, not to the accused's mental condition at the time of the shooting.

The California Supreme Court also found there was "substantial and uncontradicted evidence that no coercion occurred." *Id.*, p. 171.

I turn to 28 U.S.C. § 2254. Keeping in mind the findings of the California Supreme Court, I must ask, was this "a determination after a hearing on the merits of a factual issue"? I think it was. It was "made by a state court of competent jurisdiction." This was "in a proceeding in which [this] applicant for the writ and the state or an officer or agency thereof were parties." It was made in a "written opinion." It must therefore "be presumed to be correct" unless the applicant can bring himself within any one of the exclusions of 28 U.S.C. § 2254, numbered 1 to 8.

In considering these exclusions (there being no admissions by the respondent state) the burden is on the applicant to establish the exception.

With this in mind I turn to the district court findings in this case. It first determined that it was presently unable "to say that the confession was involuntary." (C.T. 73.) If the court was unable to do so, then, if I read § 2254 correctly, the applicant has not met the burden of proof required by that section.

The district court said that the state trial court did not "reliably" determine whether Atchley's confession was voluntary or involuntary, following the language of *Jackson v. Denno*, 378 U.S. 368, 391 (1964). As pointed out above, the Supreme Court of California referred to the "proper showing" made in the trial court "that his statements were made voluntarily."

It seems improper to me for a federal court, ten years after the event, after examining a record from which it cannot conclude the confession was involuntary, and without pointing out (except for general and conclusionary language) any evidence of convincing force that the confession was an involuntary act—to require an evidentiary hearing in the state courts.

Without any recital of a factual showing by the petitioner that he falls within the § 2254 exceptions, the purpose of the "showing required to offset the presumption created by the statute," is meaningless.

The legislative history of 28 U.S.C. § 2254 shows that it was passed "to prevent the abuse of the writ of habeas corpus" by state prisoners in federal courts.

> "Such purposes are to be attained by provisions for a qualified application of the doctrine of res adjudicata in Federal Court habeas corpus pro-

> ceedings brought by State prisoners by provisions according a presumption of correctness to factual determinations made at a hearing on the merits by State courts and by provisions with respect to the burden of proof in Federal court proceedings for habeas corpus by State prisoners." 1966 U. S. Cong. & Adm. News, p. 3663 at 3666.

The statute adopted by the Congress in 1966 says it places "the burden on him [petitioner] to establish by convincing evidence that the factual determination by the State court was erroneous." *Id.*, p. 3667.

I do not think that here it can fairly be stated that such "convincing evidence," existed, and I would reverse the district court's decision, and deny the petition, in an attempt to follow congressional dictates.

## Appendix C

§ 2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the

applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is

produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide

such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

## Appendix D

*In the Supreme Court*
*of the*
*State of California*
IN BANK

Criminal No. 6450

The People of the State of California,
Plaintiff and Respondent,
vs.
Veron Atchley,
Defendant and Appellant.

### OPINION

A jury found defendant guilty of murder in the first degree and fixed the penalty at death. The trial court denied his motion for a new trial and sentenced him to death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

Defendant was born in 1917 and was reared in a mountainous community in eastern Tennessee. He attended school only through the third grade and cannot read or write anything except his name. Some time between 1943 and 1946 he moved to California and worked in various localities as an agricultural laborer and a welder. He first met the deceased, Marcella

Katherine (Farris) Atchley, when he was working near Fresno in 1953. He saw her a number of times before he left the Fresno area, and she bore a child that he claims is his. Defendant eventually entered the used car business in Palermo, California. He bought several lots, built houses on them, and lived in one of the houses with Jewel Spoon, a woman who served as his secretary and bookkeeper. He met the deceased again in 1956 when she came to buy a used car. She returned frequently and after a series of fights with Jewel Spoon moved into defendant's home with five of her children. Jewel retired to a trailer behind the house and later left town. Defendant and the deceased quarreled frequently, but late in 1957 they took a trip and were married in Georgia. They did not publicize their marriage, hoping to avoid a reduction in the aid that she and her children were receiving from the county welfare department.

During the last few days of July, 1958, Mrs. Atchley and her children moved out of defendant's home to a house in Gridley, California. Although defendant assisted in making the move, a quarrel ensued and Mrs. Atchley complained to the police. Defendant then informed welfare personnel of her marriage to him. She in turn informed the authorities that defendant had been selling used cars without a license.

On the night of August 2, 1958, Mrs. Atchley went to a dance at Robinson's Corners with her oldest daughter and a young married couple. About 12:15 a.m. she drove her daughter home and then drove the young couple to their home in Oroville.

Defendant spent that evening drinking beer with several friends, but there is no evidence that he became drunk. Some time after midnight he drove to his wife's house in Gridley and discovered that she was not there. He drove back to Palermo, looking for her at Robinson's Corners and at several taverns along the way. He then returned to Gridley and drove by her house again. Noticing that her car was still absent, he parked his car about a block away and took from a glove compartment a 22-caliber pistol loaded with six or seven bullets. He placed the pistol inside the belt of his trousers and approached the house on foot through a back alley. He then waited in the alley and in the back yard, where he could see the headlights of his wife's car when she drove in.

About 2:25 a.m. Mrs. Atchley drove up to the carport attached to one side of her house. While she was parking, defendant moved along the opposite side of the house and stood by the front corner. Mrs. Atchley walked around to the front gate and up the walk. As she neared the door, defendant stepped out towards her. In the ensuing few minutes she was shot once in the head, once in the left breast, three times under the right arm, and, according to the prosecution's experts, once in the back. Her body was later found about 3 feet from the front walk on the side opposite the point where defendant had stepped out. She was lying face down with her feet towards the walk and her head towards the carport.

Following the shooting defendant drove back to Palermo. He buried the gun in his back yard and hid the

holster in an ash can. He then went to bed, where the police found him about 4 a.m.

At the trial defendant conceded most of the foregoing facts but maintained that he had been told that his wife was going out with another man, that he had taken the gun only to scare them, and that he had no intention of killing or injuring his wife. He stated that when he saw her returning alone, he stepped out to greet her; that his shirttails were tucked in so that the gun inside his belt was clearly visible; that she seized the gun and he struggled to recover it; that the gun went off several times during the struggle; and that after he recovered it, he fired it several more times. The defense introduced much testimony that Mrs. Atchley had said she wished to kill the defendant, that she had threatened him with a gun on several occasions, and that she was a violent and combative person.

Two neighbors testified for the prosecution that they were awakened by the voice of a woman crying hysterically, "Oh, don't, don't," followed by a series of shots. Looking out their bedroom window they saw defendant in a stooping position, shooting towards the ground. Because an intervening fence obscured the body, they assumed that he was shooting at the tires on Mrs. Atchley's car. They and another neighbor, who saw defendant arrive and walk into the back alley, testified that his shirttails were out. Defendant admitted at the trial that the gun inside his belt would not have been visible had his shirttails been out. To rebut defendant's story of a struggle for the gun, the prosecution intro-

duced evidence that all of the shots were fired from such a distance that the deceased could not have been holding the gun at the time, that Mrs. Atchley was found with her keys still clutched in her right hand, and that five empty cartridge casings were found so close to each other as to indicate that the shots had been fired with the gun in approximately the same position. Other evidence indicated that defendant had threatened his wife, that she was afraid of him, and that most of the threats and all of the acts of violence attributed to her occurred during the period of her conflict with Jewel Spoon.

Defendant contends that the trial court committed prejudicial error in admitting certain evidence. He argues first that certain photographs introduced by the prosecution were gruesome in character, were unnecessary to the prosecution's case, and were offered several days before they were to be used by the expert witnesses for the sole purpose of inflaming and prejudicing the jury.

When allegedly gruesome photographs are presented, the trial court in the exercise of its judicial discretion must decide whether their probative value outweighs their possible prejudicial effect. (*People v. Brubaker, ante,* pp. 37, 48 [346 P.2d 8]; *People v. Carter,* 48 Cal.2d 737, 751 [312 P.2d 665]; *People v. Cheary,* 48 Cal.2d 301, 312 [309 P.2d 431]. In the present case some of the challenged photographs show the deceased as she was found in her front yard, with bullet holes and bloodstains on her dress and blood on her face. They were used to illustrate testimony about

her wounds and to show the relative positions in which the body and various items of evidence were discovered. Other photographs show the deceased lying on a table at the mortuary, naked above the waist, with blood smeared on her face. These pictures were used to show the location and nature of her wounds and to explain the basis for expert opinions as to the position of the gun when the shots were fired. Although many of these photographs are decidedly unpleasant to view, they are not comparable to those held inadmissible in *People v. Redston,* 139 Cal.App.2d 485, 490-491 [293 P.2d 880] or *People v. Burns,* 109 Cal. App.2d 524, 541-542 [241 P.2d 308, 242 P.2d 9], where the deceased was shown with a shaved head and disfigured by an autopsy. In view of their probative value, the trial court did not abuse its discretion by admitting them. It was also within the discretion of the trial court to permit all the pictures taken by the same photographer to be identified at the same time, even though many of them were not to be used until later in the trial.

Defendant also contends that the trial court erred in permitting the introduction of a tape recording of a conversation between defendant and his insurance broker, Ray J. Travers. The conversation took place in the interrogation room of the county jail two days after defendant had been arrested and before he had obtained a lawyer. Defendant was unaware that his words were being recorded and did not know that Travers had formerly been a police officer or that he

had agreed to question defendant so that the recording could be made. In response to Travers' questions defendant admitted arming himself, concealing himself, watching and waiting for his wife, surprising her, and firing several shots while the gun was in his hand. He maintained however, that the shooting occurred during a struggle for the gun and that he had no intention of killing the deceased. Defendant contends that these recorded statements constitute a confession and that they were made involuntarily because Travers held out as an inducement the payment to Mrs. Atchley's children of the proceeds of an insurance policy on her life. The People contend that defendant's recorded statments do not constitute a confession and were therefore admissible even if involuntary.

There has been considerable confusion as to the admissibility in a criminal proceeding of statements allegedly made by the defendant involuntarily. (See *People v. Linden,* 52 Cal.2d 1, 29, footnote 8 [338 P.2d 397].) Many opinions distinguish "confessions" and "admissions," and state that the latter are admissible without regard to their involuntary character. (*E.g., People v. Adams,* 198 Cal. 454, 465 [245 P. 821]; *People v. Fowler,* 178 Cal. 657, 664-665 [174 P. 892]; *People v. Garcia,* 124 Cal.App.2d 822, 825-826 [269 P.2d 673]; *People v. Trawick,* 78 Cal.App.2d 604, 608 [178 P.2d 45]; *People v. Cummings,* 7 Cal.App.2d 406, 408 [46 P.2d 778]; see *People v. Wolfe,* 42 Cal.2d 663, 670 [268 P.2d 475]; *People v. Ferdinand,* 194 Cal. 555, 568-569 [229 P. 341].) The distinctions between confessions

and admissions, however, are "subtle and questionable."[1] (*People v. Chessman*, 52 Cal.2d 467, 493 [341 P.2d 679].) Moreover, a number of early cases suggest that even admissions must be excluded if involuntary. (*People v. Shem Ah Fook*, 64 Cal. 380, 381, 382 [1 P. 347]; *People v. White*, 47 Cal.App. 400 401 [190 P. 821]; *People v. Harris*, 45 Cal.App. 547, 551 [188 P. 65]; *People v. Quan Gim Gow*, 23 Cal.App. 507, 510-512 [138 P. 918].) More recently, this court has stated that "the necessity for determining the voluntary character of the statement does not depend upon whether or not it constitutes a confession of guilt." (*People v. Nagle*, 25 Cal.2d 216, 222-223 [153 P.2d 344]; see *People v. Gonzales*, 24 Cal.2d 870, 874-875 [151 P.2d 251].) We have required preliminary proof of the voluntary character of statements that include "an important incriminating fact." (*People v. Nagle, supra;* see *People v. Eggers*, 30 Cal.2d 676, 689 [185 P.2d 1]; *People v. Quan Gim Gow*, 23 Cal.App. 507,

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[1]For example, in *People v. Arnold*, 108 Cal.App.2d 719 [239 P.2d 449], the defendant was charged with murdering two men, Cavness and Greenway. His statement to the police after his arrest, that he shot Greenway "because he saw me shoot Cavness" was characterized as a "statement of his reason for shooting" and held to be an admission, not a confession. In *People v. Cryder*, 90 Cal.App.2d 194 [202 P.2d 765], the defendant made an allegedly coerced confession to robbery and a subsequent statement, also allegedly coerced, that his confession was in the main correct. The latter statement was held not to be a confession. In *People v. Cronevitch*, 86 Cal.App. 646 [261 P. 309], the defendant was charged with burglarizing certain hotel rooms. After he was arrested and some of the stolen property found in his possession, he was asked when he had entered the rooms. His reply that "all the rooms were entered between two and four o'clock, as people were sound asleep at that time" was held not to be a confession.

512 [138 P. 918].) Limitation of the exclusionary rule to full confessions has been rejected not only by the foregoing opinions of this court (*People v. Eggers, supra; People v. Nagle, supra; People v. Gonzales, supra*), but also by the American Law Institute (Model Code of Evidence rule 505) and the National Conference of Commissioners on Uniform State Laws (Uniform Rule of Evidence 63 (6); see also 78 A.B.A. Rep. 134). Moreover, the Supreme Court of the United States has held that the due process clause of the Fourteenth Amendment requires exclusion of coerced admissions if they are sufficiently damaging. *Ashcraft v. Tennessee,* 327 U.S. 274 [66 S.Ct. 544, 90 L.Ed. 667]; but *cf. Stein v. New York,* 346 U.S. 156, 162-163, footnote 5 [73 S.Ct. 1077, 97 L.Ed. 1522].)

Involuntary confessions are excluded because they are untrustworthy, because it offends "the community's sense of fair play and decency" to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. (*People v. Berve,* 51 Cal. 2d 286, 290, 293 [332 P.2d 97]; see *Watts v. Indiana,* 338 U.S. 49, 54 [69 S.Ct. 1347, 1357, 93 L.Ed. 1801]; *Lyons v. Oklahoma,* 322 U.S. 596, 605 [64 S.Ct. 1208, 88 L.Ed. 1481].) All these reasons for excluding involuntary confessions apply to involuntary admissions as well. (See *Opper v. United States,* 348 U.S. 84, 90-92 [75 S.Ct. 158, 99 L.Ed. 101]; Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43, 68.)

Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily.

The People contend, however, that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evidence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra v. Denno,* 347 U.S. 556 [74 S.Ct. 716, 98 L.Ed. 948]. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the "doctor" a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the

physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due process, largely because they were the product of "mental coercion." Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement. (*People v. Connelly,* 195 Cal. 584, 597 [234 P. 374]; *People v. Castello,* 194 Cal. 595, 602 [229 P. 855].)

While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred.

Defendant contends that the trial court erred in permitting the People to introduce on rebuttal a letter purportedly written by the deceased to Judge Savage two days before she was killed. The letter itemized

alleged sales of used cars made by defendant without a license, stated that defendant had threatened the deceased, and expressed her fear of him. Defendant contends that the introduction of this letter on rebuttal was prejudicial because he was unfairly surprised late in the trial and because several prosecution witnesses who could have been examined with regard to the letter and its contents had been finally discharged and could be recalled by defendant only as his own witnesses. The letter was admitted, however, with a limiting instruction, solely to show the deceased's state of mind and not to show that defendant had threatened her. It was therefore not objectionable as hearsay. (*People v. Brust,* 47 Cal.2d 776, 784-785 [306 P.2d 480]; *Adkins v. Brett,* 184 Cal. 252, 255-259 [193 P. 251].) It tended to prove her fear of defendant, which was relevant to defendant's claim that she was the aggressor in a struggle for the gun. Since the claim of self-defense was raised as part of the defendant's case, the letter was admissible in rebuttal.

Defendant contends that the trial court committed prejudicial error in refusing to order the prosecution to produce certain rent receipts and in admonishing the jury to disregard defense counsel's statement that he would prove the receipts to be forgeries. Defendant asserts that he should have been permitted to use the receipts to impeach the prosecution's witness, Barbara Farris, who testified on cross-examination that she had never forged a rent receipt for the deceased and that she had seen the deceased pay rent to defendant and defendant give receipts for it. The

question whether rent receipts had been forged to deceive the welfare authorities was clearly collateral to the issues being tried. The trial court had discretion to foreclose further inquiry along that line, even for purposes of impeachment. (See Witkin, California Evidence, § 673.) Moreover, in support of his request for the receipts, defense counsel offered to show merely that they were forged by Barbara "or someone else." Such a showing with regard to the particular receipts in question might well have been consistent with Barbara's testimony. Its value as impeachment, therefore, was questionable.

Defendant also contends that the trial court erroneously permitted the prosecution to cross-examine him improperly. The assistant district attorney asked him whether or not he had told the truth while testifying under oath in a prior and unrelated criminal proceeding. Defendant argues that this questioning was not proper impeachment and was beyond the scope of matters raised on his examination in chief. (See Pen. Code, § 1323.) On direct examination, however, defendant testified in detail as to the finances of his household, which had apparently given rise to numerous quarrels with the deceased. In particular, he stated that she had paid him no rent. In the prior proceeding he had testified that a certain check constituted payment of rent she owed him. This testimony directly contradicted the statement made by defendant on direct examination. Even though the matter was collateral to the issues being tried, the trial court had discretion to permit the defendant to be ques-

tioned for purposes of impeachment as to his own prior inconsistent statement. (See Witkin, California Evidence, § 673.)

Defendant was also asked on cross-examination to demonstrate certain aspects of his alleged struggle with his wife. He argues that this demonstration violated his privilege against self-incrimination and that it was not proper cross-examination because not restricted to matters about which he was examined in chief. Defendant testified on direct examination that he had been carrying a loaded pistol inside his belt, that his shirttails were tucked in so that the gun was plainly visible, that he had scuffled with his wife for possession of the gun, and that it had gone off during the struggle. On cross-examination he was required to put on the shirt he had worn on the night of the killing, to show how he had carried the gun, and to demonstrate with an assistant district attorney his and his wife's movements during the alleged struggle. These matters were clearly raised by his direct testimony. He was also asked how long his wife's arms were, and replied that they were about the same length as his own. He was then asked to hold the gun at arm's length pointed towards himself with a finger touching the trigger. The distance from the muzzle to his body was measured and found to be 10 inches. This part of the demonstration, in combination with the testimony of the prosecution's experts that the gun was fired from at least 24 inches away, was directly related to defendant's statement on direct examination that the gun had gone off while he and

his wife were struggling for it. The entire demonstration, therefore, was within the scope of permissible cross-examination (Pen. Code, § 1323; *People v. Ortiz*, 66 Cal.App. 154, 156 [225 P. 462]), and defendant waived his privilege against self-incrimination as to the matters involved when he voluntarily raised them on direct examination. (*People v. Arrighini*, 122 Cal. 121, 126 [54 P. 591]; *People v. Gallagher*, 100 Cal. 466, 474-476 [35 P. 80]; *People v. Withers*, 73 Cal. App.2d 58, 60-61 [165 P.2d 945].)

Defendant contends that the prosecution was guilty of prejudicial misconduct in its closing argument. The assistant district attorney suggested to the jury that the deceased had been shot initially in the back as she turned to run away. Defendant complains that this suggestion was based on facts not in evidence. There was evidence that a wound in the deceased's back marked the entrance of a bullet. From the position in which the body was found and other evidence, it clearly could be inferred that the deceased had turned to run. Although there was no evidence of the order in which she received the various wounds, the assistant district attorney's suggestion was nonetheless based on a reasonable interpretation of the evidence, and was thefore within the scope of permissible argument. (*People v. Cheary*, 48 Cal.2d 301, 317-318 [309 P.2d 431]; *People v. Burwell*, 44 Cal.2d 16, 39-40 [279 P.2d 744].)

The assistant district attorney also argued to the jury that if the prosecution's eyewitnesses were unable to see the killing from their bedroom window,

as the defense had suggested, defense counsel would have requested that the jury view the premises. The basis for defendant's objection to this argument is not clear. It is generally permissible to argue to the jury that an adverse inference should be drawn from the opposing party's failure to produce the strongest available evidence. (*Cf.* Pen. Code, § 1323.) Moreover, defense counsel had ample opportunity to respond to the argument or to point out that a countervailing inference could be drawn from the prosecution's failure to request a view.

The assistant district attorney misstated the law, however, when he told the jury that the killing of a human being while in the commission of a felony, to wit, assault with a deadly weapon, is murder of the first degree. (See Pen. Code, § 189.) Shortly thereafter he corrected his error and apologized to the jury. The court gave accurate instructions on murder and its degrees, and repeated those instructions at the jury's request shortly before the verdict was returned. It must be presumed that the jury followed the court's instructions and that defendant was not prejudiced by the assistant district attorney's earlier misstatement of the law.

The trial court instructed the jury that murder is in the first degree if perpetrated by lying in wait. (Pen. Code, § 189.) Defendant contends that the court's instructions were erroneous in that they permitted the jury to convict defendant of murder in the first degree without finding malice aforethought. The court, however, clearly defined murder in terms

of malice aforethought.[2] The next succeeding instruction differentiated the finding of murder from the determination of degree.[3] All instructions on lying in wait expressly presupposed a finding of murder.[4] Defendant's contention is therefore without merit.

---

[2]"Murder is the unlawful killing of a human being with malice aforethought.

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured."

[3]"Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, whether first or second."

[4]"All murder which is perpetrated by means of lying in wait, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree, and all other kinds of murder are of the second degree."

"All murder which is perpetrated by means of lying in wait is murder of the first degree.

"To constitute lying in wait, as the term is used in these instructions, a person's conduct must involve an intent to take another person unawares so as to do him bodily injury, and must include, as a means to that end, a waiting and watching for an opportune time to do the act, and also either a concealment in ambush or some other secrecy of design to take the other person by surprise.

"Lying in wait does not require any particular position of the body, or that the designing person refrain from moving about, or that he entice or trap the object of his design into any strange or puzzling situation, or that the lying in wait continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation."

"When the killing of a human being amounts to murder and is accomplished by lying in wait, it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill, but it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause his death."

Defendant also contends that there was insufficient evidence to justify giving an instruction on lying in wait. The elements necessary to constitute lying in wait are watching, waiting, and concealment from the person killed with the intention of inflicting bodily injury upon such person or of killing such person. (*People v. Thomas,* 41 Cal.2d 470, 473 [261 P.2d 1].) The testimony of one neighbor indicated that defendant waited behind his wife's house for over an hour. The evidence included admissions by defendant that he parked a block away to conceal his presence, that he waited behind the house for about 25 minutes, that he was watching for the headlights of his wife's car, and that he surprised her by stepping out "right into her face." From the fact that he had armed himself with a loaded pistol and the evidence indicating that he shot her almost immediately upon her arrival, the jury could reasonably conclude that he was waiting for her with the intention of shooting her and that the shooting was accomplished "by means of" his watching and waiting in concealment. There was therefore sufficient evidence to justify giving the instruction.

Defendant contends that the trial court erred in excluding certain medical testimony as to defendant's mental condition at the time of the shooting. He relies on *People v. Wells,* 33 Cal.2d 330 [202 P.2d 53], which holds that medical testimony as to mental state is admissible to show lack of malice aforethought or lack of premeditation and deliberation. In his offer of proof, however, defense counsel stated that the

proposed testimony would bear on defendant's ability at the time of the trial to remember what had occurred. There was no suggestion that it would bear on malice aforethought, premeditation, or deliberation. (*Cf. People v. Wells, supra,* at 345.) The record does not show, therefore, that evidence relevant to these issues was excluded.

Defendant did offer to elicit the doctor's opinion as to whether, in view of defendant's state of mind at the time of the shooting and after his arrest, it would be "normal" for him not to remember the details of the shooting or his statements to the police. He also proposed to ask the doctor about the reflex action of the trigger finger of a person under stress. The trial court ruled that the jury could evaluate these matters without the help of an expert. Both the mental stress created by involvement in a killing and the effect of such stress on finger reflexes, however, were "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole,* 47 Cal. 2d 99, 103 [301 P.2d 854, 56 A.L.R.2d 1435]; *George v. Bekins Van & Storage Co.,* 33 Cal.2d 834, 844 [205 P.2d 1037].) As to both matters, therefore, the trial court's ruling was erroneous.

The erroneously excluded evidence was significant because defendant relied primarily on the theory that the shooting was accidental or in self-defense. Since no other witness observed the first shots, it was critical whether the jury believed his story of a struggle for the gun. The proposed testimony as to reflexes

might have served to render that story more credible by providing an explanation of why so many shots were fired and why defendant continued to shoot after recovering possession of the gun. The proposed testimony as to defendant's inability to remember might have served to make defendant appear more truthful by rebutting the prosecution's suggestion that he was lying about his memory.

Upon examination of all the evidence, however, it does not appear that the erroneous exclusion of this medical testimony resulted in a miscarriage of justice. (See Cal. Const., art. VI, § 4½.) Although the testimony as to reflexes might have made defendant's story of a struggle more credible, there was abundant evidence inconsistent with a struggle, including the distance from which the shots were apparently fired, the proximity in which the five empty cartridge casings were found, the fact that defendant had armed himself and waited for his wife, the cry heard by the neighbors, and the fact that virtually every bullet in defendant's gun entered her body. Although the testimony as to defendant's inability to remember might have met one line of attack on his credibility, other lines of attack were given far more emphasis by the prosecution. Defendant was shown to have lied repeatedly to the police after his arrest and to have lied under oath in a prior criminal proceeding. Moreover, his credibility was important primarily as it affected the jury's belief in his story of a struggle for the gun. The evidence inconsistent with that story was abundant and convincing. There is therefore

no reasonable probability that admission of the excluded medical testimony would have persuaded the jury to reach a different result. (See *People v. Watson*, 46 Cal.2d 818, 836 [299 P.2d 243].)

The judgment and order denying a new trial are affirmed.

Traynor J.

Gibson, C.J., Schauer, J., Spence, J., McComb, J., Peters, J., and White, J., concurred.

Appellant's petition for a rehearing was denied December 30, 1959.

Filed, December 1, 1959,
William I. Sullivan, Clerk.

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1969

No. 642

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California,
*Petitioner,*

vs.

VERON ATCHLEY,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONER

### OPINION BELOW

The memorandum opinion of the United States District Court for the Northern District of California, printed in the Appendix at pages 68 through 79, is reported at 300 F. Supp. 68 (N.D. Cal. 1968). The Court of Appeals per curiam majority opinion affirming the order of the District Court and Judge Barnes'

dissent thereto, are printed in the Appendix at pages 80 through 85, and reported at 412 F.2d 230 (9th Cir. 1969).

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## JURISDICTION

The judgment of the Court of Appeals was entered May 27, 1969, and our petition for rehearing was denied June 26, 1969. The petition for certorari was filed with this Court September 4, 1969, and granted February 24, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

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## QUESTIONS PRESENTED

1. Whether the District Court erred in refusing to apply the presumption of correctness declared in Title 28, United States Code, Section 2254(d), to the finding by the California trial and appellate courts that Atchley's tape recorded statement was voluntary.

2. Should a district court on a petition for a writ of habeas corpus relitigate the voluntariness of a confession where this issue was presented to the state trial court whose decision adverse to the defendant was affirmed by a unanimous state supreme court?

3. Can a federal district court compel the state courts to act beyond their jurisdiction by invoking the "procedure of convenience" outlined in *Jackson v. Denno,* 378 U.S. 368 (1964).

## STATUTE INVOLVED

This case concerns the proper interpretation of Title 28, United States Code, Section 2254(d), which is set forth in Appendix C to the Petition for Certiorari at pages 19 through 22.

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## STATEMENT OF THE CASE

### A. Proceedings in the State Courts.

Veron Atchley was convicted by a jury of the first degree murder of his wife. The death penalty was imposed. Upon appeal to the California Supreme Court his conviction was affirmed in an opinion set forth in the Appendix at pages 48 through 67, and reported at 53 Cal.2d 160, 346 P.2d 764 (1959).

Subsequently, Atchley's sentence was commuted by the governor to life imprisonment with eligibility for parole.

### B. Proceedings in Federal Courts.

Atchley's petition to this Court for a writ of certiorari to review the decision of the California Supreme Court affirming his conviction and the imposition of the death penalty was granted. After hearing argument this Court concluded that the totality of circumstances manifested by the record did not warrant bringing the case before it. Accordingly, the writ was dismissed. *Atchley v. California,* 366 U.S. 207 (1961).

Atchley then unsuccessfully petitioned the United States District Court for the Northern District of

California for a writ of habeas corpus. The District Court's denial of that petition was affirmed on appeal. *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

The instant proceedings commenced with the filing of a petition for a writ of habeas corpus in the District Court for the Northern District of California on March 10, 1967. An order to show cause issued, counsel was appointed and a supplemental return and traverse were filed. See Appendix pages 7 through 47.

The District Court ordered Atchley's release from custody unless the state afforded him a hearing on the voluntariness of his confession or a new trial. *Atchley v. Wilson,* 300 F.Supp. 68, 73 (N.D. Cal. 1968), Appendix pages 78-79. Warden Wilson appealed to the Court of Appeals for the Ninth Circuit which affirmed the order of the District Court in a per curiam opinion. Judge Barnes dissented. *Wilson v. Atchley,* 412 F.2d 230, 231-232 (9th Cir. 1969), Appendix pages 80-85.

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## STATEMENT OF FACTS

### (A) The Shooting.

At approximately 2:30 a.m. on August 3, 1958, defendant's wife, Marcella Katherine Atchley was shot and killed in the front yard of her home in Gridley, Butte County, California (RT 601-608).[1]

Several days previously she had separated from defendant and moved with her children from his home

[1] "RT" refers to the Reporter's Transcript on Appeal to the California Supreme Court, a copy of which was before the District Court, the Court of Appeals and has been lodged with this Court.

in Palermo to Gridley (RT 513-514). On the evening before her death defendant arrived at her home about 12:30 a.m., parked his car a block away and walked to the house (RT 696). When he did not see his wife's car and no one answered the door, he left to search for her at several bars (RT 1491-1492). Defendant returned to his wife's house about 1:20 a.m. and again parked his car a block away from the house (RT 2352-2353). He removed a .22 caliber automatic pistol from the glove compartment of his car, placed it in the belt of his trousers (RT 1512) and approached the house through a back alley (RT 842).

Atchley waited near the back of the premises until he could see the headlights of his wife's car as it entered the driveway (RT 1536). Mrs. Atchley left the car and was approaching the front door of her house when the defendant stepped from behind the corner of the house (RT 954-955). In the next few minutes Mrs. Atchley was shot six times (RT 1043-1046). Five empty cartridge casings were found near the body in such proximity as to indicate that all of the shots had been fired with the gun in approximately the same position. The absence of powder burns on the victim's clothing showed that the gun was at least two feet from her at the time of the shooting (RT 820-822).

The neighbors were awakened by a woman's voice hysterically crying "Oh, don't, don't" (RT 602), followed by a series of shots (RT 603). They observed the defendant in a stooped position fire two shots toward the ground (RT 603) but their view of the body

was obscured (RT 604). When one of the neighbors asked "What in the hell is going on over there" (RT 604, 605), defendant immediately darted to his car and drove off at a high rate of speed (RT 698).

Defendant returned to his home in Palermo, where he buried the murder weapon in his backyard (RT 956).

Defendant was arrested at his home about an hour and a half after the shooting (RT 956).

**(B) Defendant's Statements Admitted at Trial.**

Defendant was first questioned at 6 a.m., August 3, by Mr. Anderson, an investigator for the District Attorney's office. At that time defendant stated that he had not been in Gridley that night and denied owning a .22 caliber pistol. He claimed to have gone to bed at his residence in Palermo at 12:30 a.m. and thought Mr. Jones, who had previously threatened Mrs. Atchley, might have done the shooting (RT 836-839). No objection was made to the admission of this statement.

Defendant was not questioned again until 11:30 p.m. on August 3 when Mr. Lazier, an investigator for the State Department of Justice, arrived (RT 759-760). Mr. Lazier made no promises of immunity or threats to induce defendant's statements (RT 761) which were substantially the same as he had given earlier (RT 762-768). These were admitted at trial over defendant's objection (RT 761-762). This questioning continued until about 5 a.m. on August 4, at which time defendant was returned to his cell where he slept until noon (RT 772-773).

During the morning of August 4, the police located the murder weapon at defendant's home in Palermo (RT 775). Defendant, knowing that he was booked for investigation of murder, did not appear nervous when the officers confronted him with the weapon that afternoon (RT 773). He then changed his former story and admitted burying the gun in his backyard (RT 775-776). He also admitted that he had driven to Gridley on the night of the shooting, parked his car about one and a half blocks away from his wife's home, entered the premises by way of the back alley and waited in the rear of the premises (RT 776). When he heard his wife's car enter the carport, he came out from behind the corner of the house and proceeded toward her (RT 777). He claimed that she pointed the gun at him and it went off several times during a struggle (RT 777). After he wrestled the gun away from her it went off several additional times (RT 777). He took the gun with him and returned to Palermo where he buried it (RT 777-778). This statement was admitted after voir dire examination on defendant's objection to its voluntariness (RT 770-774).

**(C) The Now Challenged Statement.**

Late on the afternoon of August 4, defendant telephoned Ray Travers, a friend and his insurance agent, and asked him to come to the jail (App. 140-141).[2] Mr. Travers arrived at the jail about 10 a.m. on August 5 (App. 141) and had a conversation with

[2]This portion of the reporter's transcript is reproduced in the Single Appendix.

defendant relative to an insurance policy on the life of the decedent which was payable to her children (App. 143-144). During the course of this conversation defendant, on his own initiative, told Travers how the shooting took place (App. 152). As Travers was leaving the jail, he informed the sheriff's officers about defendant's statement (App. 141-142). Travers intended to return to get additional information from defendant for his insurance company (App. 142, 156), and agreed to let the officers tape record their next conversation (App. 156).

At about noon on August 5, Travers returned and had another conversation with defendant. Travers testified that defendant's statements were given freely and voluntarily without promises or inducements (App. 144-145). Atchley was aware that this information had to be reported to Travers' insurance company (App. 142-143).

This tape recorded conversation was played to the jury over defense objection (App. 159-160).

In this statement, Atchley told Travers that on the night of the shooting he was standing behind the corner of the house waiting for Mrs. Atchley's arrival (App. 97, 102). She lunged for the pistol he had tucked in the belt of his trousers and a struggle ensued (App. 97-98, 102-103). During this struggle the gun discharged three times (App. 98). After he pushed her to the ground, the gun, still in his hand, discharged twice (App. 98).

Defendant admitted that he owned the gun over a year and kept it in his car (App. 100-101). He car-

ried the gun to the house to scare the man Mrs. Atchley was running around with (App. 99), and did not intend to kill her (App. 99).

**(D) Defendant's Subsequent Statements Admitted at Trial Without Objection.**

Defendant did not make any further statements until August 7, 1958, when he was taken to view his wife's body at the mortuary (RT 840). In a conversation which was given freely and voluntarily (RT 874), he told substantially the same story he told Travers (RT 841-850).

**(E) Other Evidence Presented at Trial.**

At trial, defendant testified that he had been waiting near the back of the house for his wife to return (RT 1495), that he had the pistol in his belt (RT 1496) but maintained that he had it only to scare her for he had no intention of killing her (RT 1501-1502). He testified that when he saw her returning alone he stepped out to greet her but she saw the gun under his shirttail and lunged for it (RT 1497). During the struggle to recover the gun it discharged several times and even after he recovered it, it fired several additional times (RT 1499).

Defendant was born in Tennessee in 1917 where he attended school through the third grade. He could neither read nor write anything other than his name. He moved to California in the early forties and worked initially as an agricultural laborer and then as a welder (RT 1411, 1416-1419). He met the decedent in 1953 and she bore a child which he claimed

was his (RT 1422, 1586). Later in 1953 he left the decedent and moved to Palermo where he opened a bar which he later sold and went to work for his brother in the used car business (RT 1550-1551). He subsequently opened his own used car lot which netted him between eight and thirteen thousand dollars per year (RT 1554). In operating this business he had retained various attorneys and engaged in law suits in Butte County (RT 1551).

In 1957 Mrs. Atchley came to Palermo and moved in with the defendant (RT 1436-1437). They were later married in Georgia but the marriage was not publicized in order to avoid a reduction in the child welfare aid Mrs. Atchley was receiving (RT 1462, 1476). Prior to the shooting, Mrs. Atchley had complained to the police of defendant's threats and also expressed these fears to others (RT 2089, 2339-2340).

During argument defense counsel made the following reference to the now challenged statement,

> ". . . and I think when . . . Atchley was in there that first meeting at 10 o'clock and before they knew anything at all about a whole lot of these things that you have heard here, that . . . Atchley did tell Travers definitely what occurred there. * * * I was going to introduce this statement to you, Ladies and Gentlemen, if the State had not put it in, I would have put it in. Now, let me go over the important parts of this statement." (RT 2587).

The case was tried on the theory of murder which was deliberate and premeditated and also on the the-

ory of murder perpetrated by means of lying in wait. Cal. Pen. Code § 189. The jury was instructed as to second degree murder (CT 163-164);[3] manslaughter (CT 166-168); justifiable homicide (CT 174-175) and self-defense (CT 176-180).[4] The jury concluded that defendant was guilty of murder in the first degree (CT 188).

Pursuant to California procedure defendant's conviction was automatically reviewed by the California Supreme Court [Calif. Pen. Code § 1239, subd. (b)] and affirmed in a unanimous opinion which recognized for the first time in our state that "any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily". *People v. Atchley,* 53 Cal.2d 160, 170, 346 P.2d 764, 769 (1959) App. p. 56. On certiorari from that decision the sole issue presented in Atchley's brief was the voluntariness of his statements. See "Brief of Petitioner" No. 95, October Term, 1960. After hearing oral argument and fully examining the record this Court concluded that "the totality of circumstances as the record makes them manifest did not warrant bringing the

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[3]"CT" refers to the Clerk's Transcript on Appeal, a copy of which was lodged with the District Court and is before this Court.

[4]Petitioner did not request any instructions on admissions or confessions (CT 99-125) and, except for the following cautionary one, none were given:

"The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him." (CT 144).

case [before the court]". *Atchley v. California*, 366 U.S. 207 (1961).[5]

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**SUMMARY OF ARGUMENT**

The District Court erred in granting the writ of habeas corpus in this case because the state court findings that Atchley's confession was voluntarily given were entitled to a presumption of correctness under Title 28, United States Code Section 2254(d). None of the reasons advanced by the District Court for refusing to apply that presumption find any support in the record; indeed, they can be answered by an examination of the opinion of the California Supreme Court. Moreover, the record shows that Atchley's confession was voluntary as a matter of law.

Secondly, this Court should adopt a rule confining the scope of review on federal habeas corpus to the face of the opinion of a state appellate court where the state has provided the prisoner with an adequate corrective process for the adjudication of federal constitutional issues based on disputed questions of fact. Previous decisions of this Court have given insufficient weight to the importance of the finality of state criminal judgments. This Court should consider the effect of its recent series of decisions which guarantee state

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[5]While we recognize the general rule that a denial of certiorari is not entitled to persuasive effect in subsequent proceedings [*Brown v. Allen*, 344 U.S. 443, 489-498 (1953)] where, as in this case, certiorari is withdrawn as having been improvidently granted after briefs were filed and argument heard it must be presumed that the record did not manifest any unfairness at the hearing on the issue of the voluntariness of Atchley's statements.

criminal defendants the right to a meaningful appeal in the state courts.

Finally, the District Court erred by ordering the California courts to hold a hearing on the admissibility of petitioner's confession where no California court has jurisdiction to do so in the absence of an application by petitioner.

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## ARGUMENT

### I

### THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE PRESUMPTION OF CORRECTNESS DECLARED IN TITLE 28, UNITED STATES CODE, SECTION 2254(d), TO THE FINDINGS OF THE STATE TRIAL AND APPELLATE COURTS THAT ATCHLEY'S TAPE RECORDED STATEMENT WAS VOLUNTARY

*Townsend v. Sain,* 372 U.S. 293 (1963), empowers federal district courts to hold evidentiary hearings to resolve contested issues of fact in habeas corpus proceedings brought by state prisoners. A duty to hold such hearings was imposed on the district courts only when the state courts had not provided a full and fair evidentiary hearing on the issue. Guidelines were announced for the district courts to follow in exercising their discretion to hold plenary hearings in other cases.[6]

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[6]Those guidelines were: (1) The merits were not resolved in the state court proceedings; (2) The factual determinations made in the state court proceedings were not fairly supported by the record; (3) the procedure employed in the state court was inadequate to a full and fair hearing; (4) There was a substantial allegation of newly discovered evidence; (5) Material facts were not adequately developed; (6) The state did not afford a full

Thereafter, Title 28, Section 2254 was amended [Public Law 89-711, § 2, 80 Stat. 1105] to increase the number of situations in which a state court determination of a factual issue was to be accorded finality. *See* Statute Note, 45 Tex.L.Rev. 592, 596. These amendments to Section 2254 apply a qualified doctrine of res judicata in federal habeas corpus proceedings brought by state prisoners. *See* Senate Report 1979, 89th Cong. 2d Sess. 1, 3 U.S. Code, Cong. § A.B. News 36, 63 (1966). When enacted, Section 2254(d) was hailed as a great assistance to the district courts in relieving their overcrowded dockets by limiting the situations in which evidentiary hearings should be held. Cerf, *The Federal Habeas Corpus Act,* 22 U.Mi.L.Rev. 409, 492 (1967). It was also felt to have effected a badly needed reform in reducing the rising friction between state and federal judicial systems. *Johnson v. Florida,* 283 F.Supp. 494, 497 (S.D.Fla. 1968).

The failure of the federal district courts to give this amendment the effect intended by Congress, as exemplified by this case, has led to more drastic proposals for legislative reform.[7] If the reforms intended

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and fair hearing. *Townsend v. Sain, supra,* at 313-318. Title 28, United States Code, Section 2254(d) codifies most of these guidelines with the notable exception of "newly discovered evidence" which, having been specifically deleted, will not support a collateral attack on the presumptive validity of a state court finding.

[7]The "Omnibus Crime Control and Safe Streets Bill of 1968" was reported from Senate Committee with provisions which removed from federal courts the power to reverse state convictions involving admissions or confessions introduced into evidence as voluntarily given where the highest court of the state had ap-

by the enactment of Title 28, United States Code Sec-2254(d) are frustrated, as they were in the instant case, then more severe legislative action is to be expected.

Title 28, United States Code Section 2254 as amended in 1966, accords a presumption of correctness to factual determinations made by state Courts at a hearing on the merits. The burden of establishing an exception to this presumed validity rests on the prisoner who must show, by convincing evidence, that the factual determination of the state court was erroneous. 1966 U.S. Cong. & Adm. News Vol. II, pp. 3666-67.

**A. The State Courts' Findings on the Issue of Voluntariness.**

**1. The Trial Court Finding:**

In the instant case, following his arrest, defendant Atchley made numerous statements. Initially he denied being near the decedent's home on the night of the murder (RT 150-152; 759:768) until the police found the murder weapon at his house. He then admitted going to his wife's home (RT 776) but claimed that the gun was his wife's and it discharged during a struggle to prevent her from shooting him (RT 777).

Defendant's later statements to Travers altered his previous statements only by admitting that he had brought the pistol to the scene (App. p. 98).

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proved their admission. 1968 U.S. Cong. & Adm. News, Vol. II, p. 2123. The committee felt that whether a confession was voluntarily given is essentially a question of fact which should be decided at the trial level.

Two days after his conversations with Travers, which defendant did not know had been recorded, he told the sheriff's officers substantially the same story (RT 841-850). This statement was admitted at trial without objection (RT 840-850).

When the prosecutor offered into evidence the tape recording of defendant's second conversation with Travers, counsel objected and requested an in chambers hearing on his objections (App. p. 86). During the course of this hearing it became apparent to the trial court after listening to the tape recording that the statement approached a confession (App. p. 126-127) and the court admonished the prosecutor that "before the tape is used I think that the same foundation should be laid as is used for the introduction of a confession" (App. p. 127). The court then ruled that the tape would not be played to the jury unless such a foundation was laid (App. p. 131).

When court reconvened before the jury Travers' testimony established the necessary foundation (App. pp. 141-145) and the court allowed the tape recording to be played over defendant's objection (App. p. 160). This admission of Atchley's statement to Travers over his objection to its voluntariness was clearly "A determination after a hearing on the merits of a factual issue," and thus entitled to the presumption of validity conferred by Title 28, United States Code, Section 2254(d).

**2. The Appellate Court Holding:**

The California Supreme Court, after a full review of the record, recognizing that Atchley's statement would be inadmissible if made involuntarily (*People v. Atchley,* 53 Cal.2d 160 at 170-171, 346 P.2d 764 at 769), unanimously found that there was "no merit in defendant's contention that this recording was admitted without a proper showing that his statements were made voluntarily". That court, while reviewing the admissibility of Atchley's statements, noted particularly Travers' testimony that there were no threats nor inducements for these statements and found "substantial and uncontradicted evidence that no coercion occurred." *People v. Atchley,* 53 Cal.2d 160, 170-171, 346 P.2d 764, 769 (1959). We submit that this holding of the California Supreme Court made after a full review of the trial record is entitled to the presumptive validity conferred by Title 28, United States Code, Section 2254(d).[8]

**B. The District Court Erroneously Concluded that the Presumptive Validity of these Findings had been Vitiated.**

In contrast to the specific findings of the state courts, the District Court concluded that there had been no reliable determination of the issue of the voluntariness of this confession (App. p. 76). Defendant had the burden of overcoming the presumptive va-

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[8]Symptomatic of the confusion over the proper application of Title 28, United States Code Section 2254(d) in the Ninth Circuit are *Mathis v. Nelson,* 411 F.2d 1363, 1372 (9th Cir. 1969), which holds that appellate court opinions are entitled to the presumption of validity and *Hutchinson v. Craven,* 415 F.2d 278, 279-280 (9th Cir. 1969), which denies to such holdings this presumption.

lidity accorded these findings. The record does not support the District Court's conclusion that Atchley rebutted the presumptive validity of either the state trial or Supreme Court finding that his statement was voluntary.

The District Court, in the face of the California Supreme Court's conclusion to the contrary, held that the trial Court erred in five specific instances[9] by refusing to hear evidence offered by the defendant prior to the introduction of this tape recording. Based upon this conclusion, the District Court held that the fact finding procedure employed by the state Court was not adequate to afford a full and fair hearing on this issue and thus the presumption of validity was rebutted (App. pp. 76, 78 n. 8). Title 28, U.S.C. § 2254 (d)(2).

However, the development of the material facts in the trial court was adequate in every respect. Most of the evidence Atchley allluded to on the issue of voluntariness at the in-chambers hearing was eventually admitted and thus was contained in the record reviewed by the California Supreme Court. That court was confronted with defendant's contention that the trial court erred in admitting the statement.

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[9]Discussed individually *infra*, the specific instances of alleged error are: (1) that defendant had communicated to the police his desire to have an attorney; (2) that Travers' feigned sympathy for the defendant deceived him about his motives in questioning him; (3) that defendant did not know the statement was being tape recorded; (4) what the officers said to Travers before he agreed to allow his conversation with the defendant to be tape recorded; and (5) evidence of defendant's mental condition, his ability to read and write, and the extent of his education at the time the statements were taken (App. pp. 74-76).

This tape recording was played in chambers prior to the court's ruling on its admissibility and it reflects the following colloquy regarding Atchley's request for counsel:

> "Q. [Travers] I don't know who your attorney is. What was that fellow's name?
> A. [Atchley] I was trying to get Madino Cardo(?)
> Q. Madino Cardo?
> A. Yes.
> Q. San Jose?
> A. Yes." (App. pp. 104-105).

When defense counsel attempted to elicit additional information from Travers regarding defendant's requests for counsel, the trial court sustained the prosecutor's objection on the grounds of relevancy (App. p. 155).

Since the California Supreme Court had held such evidence material on the issue of voluntariness as early as 1951 (*People v. Stroble,* 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 [1951]) defendant correctly contended on appeal that this ruling was erroneous. However, he could not establish that it was prejudicial. As the California Supreme Court noted in defendant's case:

> "Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the *substantial and uncontradicted* evidence that no coercion oc-

curred." (Emphasis added). *People v. Atchley, supra,* 53 Cal.2d at 171, 346 P.2d at 770, App. p. 58.

Defendant never claimed he could not afford an attorney and the record establishes that he had access to the telephone (App. p. 141).

The California Supreme Court also directed itself to defendant's contention regarding Travers' feigned sympathy and concluded:

> "In . . . [*Leyra v. Denno,* 347 U.S. 556 (1954)] the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. . . . Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement." *People v. Atchley, supra,* 53 Cal.2d at 171, 346 P.2d at 769.

Whether Atchley knew his conversation with Travers was being recorded is irrelevant. While talking to Travers, defendant understood that his statements would not be held in confidence, that they would at least be forwarded to the insurance company (App. pp. 142-143). Hence, although the tape recorder may have been an uninvited ear, the statements it overheard had been knowingly exposed to the public by defendant. *Compare, Katz v. United States,* 389 U.S. 347, 351-352 (1967).

The District Court's conclusion that the hearing in the trial court was inadequate is based in part upon its finding that the trial court erred in limiting the proposed recross-examination of the undersheriff, who requested Travers' permission to make a tape recording of the second conversation. Undersheriff Spann was called by the prosecution prior to the introduction of the tape recording and his direct examination did not cover his conversations with Travers. Atchley requested an opportunity to reopen his cross-examination in order to go into these matters prior to the introduction of the tape recording. California and the majority of states follow the federal rule restricting cross-examination to the scope of the direct examination and thus, the trial court properly limited the proposed recross-examination of Officer Spann. Defendant could not have suffered any prejudice since his attorney knew he could call any of the People's witnesses as his own on direct examination and go into any matter relevant to the case (RT 932). Furthermore, whatever Undersheriff Spann may have said to Travers before he consented to their tape recording his second conversation with Atchley is immaterial to the voluntariness of that statement. Travers testified that prior to the officer's request that they be allowed to tape record his conversation with the defendant he intended to have an additional conversation with the defendant in order to acquire additional information for his insurance company (App. p. 156).The recorded conversation, as heard by the trial court, does not reflect any evidence of coercion

or pressure brought to bear by Travers either on his own volition or under direction of the undersheriff (App. pp. 97-105).

Finally, the District Court's charge that the trial court erred in excluding evidence regarding defendant's ability to read and write prior to admitting this tape recording is directly refuted by the record. Travers testified on cross-examination that he was unaware Atchley could not read nor write (App. p. 146). When asked if he had ever given Atchley anything to read the prosecutor objected that the question was irrelevant to the issue of voluntariness (App. p. 147). A lengthy discussion ensued until the trial court ruled "The objection will be overruled. You may proceed" (App. p. 148). Thereafter, defense counsel failed to pursue the issue of whether Atchley could read and write. Hence, the trial court cannot be charged with erroneously excluding such evidence. Indeed, such evidence was beyond the knowledge of this witness.

The District Court concluded that because of these erroneous exclusions of relevant evidence on the issue of voluntariness the hearing held in the trial court was not adequate to insure a reliable and clear cut judicial determination of the voluntariness of the confession as required by *Jackson v. Denno,* 378 U.S. 368, 369 (1964). Appendix p. 76. *Jackson v. Denno, supra,* concerns the inherent integrity of the fact finding process and has been held to be fully retroactive. *Pinto v. Pierce,* 389 U.S. 31 (1967). However, at the time of defendant's trial California followed the approved, or "Massachusetts," procedure for the ad-

mission of confessions. *Jackson v. Denno, supra,* at 418 (Black, J., dissenting). As recognized by the trial court (App. p. 127) the burden rested upon the prosecution to establish that the confession was voluntary (*People v. Trout,* 54 Cal.2d 576, 583, 354 P.2d 231, 235 [1960]; *People v. Berve,* 51 Cal.2d 286, 291, 332 P.2d 97, 99 [1958]). The prosecution met the foundational requirement by presenting evidence of voluntariness (App. pp. 140-145) and the defendant had an opportunity to controvert the prosecution's showing (App. pp. 146-159). The trial judge was "duty bound to withhold . . . [the statement] from the jury's consideration" if he found the statement to be involuntary. *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944). Thus, defendant secured a judicial determination on the issue of voluntariness, as required by *Jackson v. Denno,* 378 U.S. 368 (1964), before the statement was submitted to the jury.

Although, he could have had this issue resubmitted to the jury, defendant never requested any instructions regarding his statements (CT 100-125). In fact, he argued to the jury the truth of the now challenged statement (RT 2587). Contrary to the District Court's holding (App. p. 78, n. 8) only where the evidence concerning the circumstances surrounding a confession is in conflict must the trial court instruct the jury that they should also make a determination on the issue of voluntariness. *People v. Belvins,* 54 Cal.2d 71, 77, 351 P.2d 776, 780 (1960). The evidence in the instant case was not in conflict as to the circumstances surrounding the defendant's statement. There was no

factual question to be resolved by the jury, and therefore, no instructions on this issue were required. *Compare, Commonwealth v. Howard,* 212 P.A. Super, 100, 239 A.2d 829 (1968).

The District Court apparently concluded that certain applications of the classic test of voluntariness[10] announced by this Court after defendant's trial[11] were "new" law in the field of voluntariness and alternatively held that the trial Court followed an erroneous standard of law in determining this issue (App. p. 78, n. 8). However, those cases did not direct attention to any circumstances to be considered in ultimately determining voluntariness which were not implicit in earlier opinions of this Court[12] and were also recognized law in California at the time of defendant's trial.[13] Surely this Court does not envision relitigating the issue of voluntariness in every case where a statement was admitted against a prisoner whenever it applies the test of voluntariness to a situation which requires a reversal.

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[10]Whether an examination of "the totality of the circumstances" shows that the defendant was deprived of "a free choice to admit, to deny, or to refuse to answer." *Lisenba v. California,* 314 U.S. 219, 241 (1941).

[11]*Reck v. Pate,* 367 U.S. 433 (1961); *Culombe v. Connecticut,* 367 U.S. 568 (1961); *Gallegos v. Colorado,* 370 U.S. 49 (1962); and *Davis v. North Carolina,* 384 U.S. 737 (1966).

[12]*See, Chambers v. Florida,* 309 U.S. 227 (1939); *Ashcraft v. Tennessee,* 322 U.S. 143 (1943); *Lisenba v. California,* 314 U.S. 219 (1941); *Turner v. Pennsylvania,* 338 U.S. 862 (1949); and *Fikes v. Alabama,* 352 U.S. 191 (1955).

[13]*See, In re Wallace,* 24 Cal.2d 933, 937, 152 P.2d 1, 3 (1944); *People v. Stroble,* 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951); *People v. Millum,* 42 Cal.2d 524, 526-528, 267 P.2d 1039, 1040 (1954); *People v. Berve,* 51 Cal.2d 286, 292, 332 P.2d 97, 100 (1958); and *People v. Speaks,* 156 Cal.App.2d 25, 36-37, 39, 319 P.2d 709, 716-719 (1957).

**C. Defendant's Statement was Voluntary as a Matter of Law.**

As noted in *Davis v. North Carolina,* 384 U.S. 737 (1966), the non-retroactive effect of *Miranda v. Arizona,* 384 U.S. 436 (1966), does not affect the duty of trial courts to consider claims that a statement was taken under circumstances which violated the standards of voluntariness as those standards had begun to evolve before this Court's decision in *Miranda v. Arizona, supra,* and *Escobedo v. Illinois,* 378 U.S. 478 (1964). Although there are numerous circumstances to be considered in deciding a claim of involuntariness, the essential test remains unchanged. "Is the confession a product of an essentially free and unconstrained choice by its maker?" *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961). In this case it can be said, as a matter of law, that this statement was the product of Atchley's free and unconstrained choice.

The only reference contained in the District Court's Memorandum of Decision to the fact that two separate conversations took place between defendant and Travers was:

> "Travers testified that he had visited the jail in the morning of August 5th and conversed with Atchley at Atchley's request. After that conversation, Travers admitted that he was asked by the undersheriff to engage Atchley in a second conversation which would be recorded and that he complied with the request. Travers further testified that he offered no threat, promise or inducement to Atchley." App. p. 72.

Although this summary of the first and second conversations is correct, we submit that its brevity over-

looks the importance of this circumstance. We have consistently contended that the tape recorded conversation, being substantially the same as the initial conversation, was voluntary as a matter of law.

Travers testified that on the evening of August 4, defendant requested that he visit him in order to talk about the insurance policy and replenish his supply of cigarettes (App. 141-143). Of this initial conversation, Travers said:

> "Mr. Atchley brought the subject up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time." (App. 152).

Travers testified on cross-examination that prior to his initial conversation with defendant he was never asked by the police to interrogate him about the shooting (App. 152). In response to further questioning by defense counsel Travers testified that the first and second conversations were substantially the same (App. 152, 158).

After the morning conversation, Travers told Officer Spann what defendant had told him and informed him that he had to return later in order to secure further information for his insurance company (App. 141-142). Travers did not threaten defendant nor offer any inducement to secure the statements App. 142). During the recorded conversation defendant understood that what he said would have to be reported to the insurance company (App. 142-143).

Since the initial conversation was clearly spontaneous, and there being no allegation nor proof of any intervening coercive influences, it must be held that defendant's second conversation with Travers was voluntary as a matter of law. Furthermore, Atchley cannot establish that he was prejudiced by the admission of the tape recording since it contained substantially the same statements Travers testified defendant made during their first conversation (App. 152, 158).

We submit, therefore, that the District Court erred in not holding the statement voluntary and dismissing the petition.

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## II

**ON FEDERAL HABEAS CORPUS PROCEEDINGS BROUGHT BY STATE PRISONERS THE DISTRICT COURT'S SCOPE OF REVIEW SHOULD BE CONFINED TO WHETHER THE PRISONER WAS AFFORDED A FAIR REVIEW OF HIS CONVICTION IN THE STATE COURTS WHICH WAS ADEQUATE TO ALLOW A RESOLUTION OF THE MATTERS HE SOUGHT TO PRESENT**

In this case, Atchley challenged the admissibility of his confession at trial and on appeal to the California Supreme Court. That court, well aware of the rule that a confession is inadmissible unless voluntarily made, reviewed the transcript and prepared an opinion which considered and resolved each of Atchley's contentions. This Court brought the state proceedings before it on a writ of certiorari and, after hearing argument, dismissed the writ as improvidently granted. If the District Court's decision in this case

is correct, then the state appellate review in this case was useless. Indeed, it is a waste of judicial resources for state appellate courts to adjudicate constitutional claims in criminal cases. That is why the instant case presents this Court with an opportunity to effect a badly needed reform in the administration of federal habeas corpus, a reform which will give greater finality to state appellate court decisions, conform to the intent of Congress as manifested in Title 28, United States Code Section 2254(d), and relieve crowded federal dockets, while not substantially detracting from the protections now available to state criminal defendants. In fact, it may well serve to make those protections more effective. We submit that such a reform is necessary to relieve the major cause of the present stress on the administration of justice, caused by the federal district courts' refusal to afford finality to state criminal judgments where the facts underlying the constitutional claims have been fairly litigated in the state courts.

We therefore ask this Court to adopt the following rule:

> "Where the state has provided adequate corrective process for the adjudication of the factual issues bearing on a prisoner's federal constitutional claims, either by way of appeal or collateral attack, and it appears from the face of a state appellate court opinion that the prisoner's contentions were fairly considered in the light of applicable constitutional law, the federal district court should not undertake further review of those factual issues."

We acknowledge that this proposed rule is something of a departure from previous decisions of this Court. In *Brown v. Allen,* 344 U.S. 443 (1953), this Court held that a prisoner who had exhausted state court procedures for the litigation of his constitutional claims could reassert them on federal habeas corpus. This holding was extended in *Fay v. Noia,* 372 U.S. 391 (1963), to allow federal review of cases in which the state prisoner's confinement rested on an adequate and independent state ground. Contemporaneously, this Court broadened the power of district court judges to hold evidentiary hearings on contested issues of fact. *Townsend v. Sain,* 372 U.S. 293 (1963). In asking this Court to modify these rules we seek to change the thrust of inquiry on federal habeas corpus away from whether the ultimate factual issues were correctly decided and direct it toward whether the prisoner had a fair opportunity in the state courts to have as complete a hearing on his claim as he desired. This proposed rule will afford finality to criminal judgments in those cases where a state prisoner has been given a meaningful appeal, or its equivalent on state collateral attack, and an examination of the opinion of the state appellate court shows that the prisoner's constitutional claims were fairly considered. Under this rule, where it appears that the prisoner has had a fair opportunity to present his claims to the state appellate courts, as defendant did in the instant case, and the state appellate court has applied the correct legal standard, the writ should be denied without an evidentiary hearing or review of the state trial court transcript.

In support of our proposed rule we call the Court's attention to the following considerations.

**A. Finality of Criminal Judgments**

We submit that the decisions in *Brown v. Allen*, 344 U.S. 443 (1953); *Townsend v. Sain*, 372 U.S. 293 (1963), *Fay v. Noia*, 372 U.S. 391 (1963), and *Sanders v. United States*, 373 U.S. 1 (1963), gave insufficient consideration to the importance of finality of criminal judgments. The proposed rule corrects this imbalance.

In *Fay v. Noia*, 372 U.S. 391, the majority opinion stated:

> "Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary judicial review." *Id.* at 424.

This Court is now presented with an opportunity to reconsider this principle. We urge its rejection in favor of a rule which would afford finality to state court judgments in those cases where the history of the proceedings as reflected in the opinion of a state appellate court shows that the issues sought to be litigated by the habeas petitioner were argued and fairly considered in state court proceedings adequate for their just resolution and conducted in a manner consistent with the opinions of this Court.

State trial and appellate procedures have received considerable attention from this Court since *Noia*,

*Townsend* and *Sanders* were decided. While those decisions were eroding the finality of state criminal judgments, other decisions of this Court guaranteed every state criminal defendant the availability of adequate state corrective process both for the litigation at trial and review on appeal of federal questions in the state Courts. State prisoners are now entitled to counsel at trial, *Gideon v. Wainwright,* 372 U.S. 335 (1963); confrontation of witnesses, *Pointer v. Texas,* 380 U.S. 400 (1965); definitive rulings by trial judges on their objections to the admissibility of confessions, *Jackson v. Denno,* 378 U.S. 368 (1964); *Sims v. Georgia,* 385 U.S. 538 (1967); and, where the state provides appellate review in criminal cases, the right to a free transcript of the trial proceedings or its equivalent for review on appeal, *Griffin v. Illinois,* 351 U.S. 12 (1956); *Draper v. Washington,* 372 U.S. 487 (1963); and the right to counsel on appeal, *Douglas v. California,* 372 U.S. 353 (1963), serving in the capacity of an advocate, *Anders v. California,* 386 U.S. 738 (1967). The requirements that have been imposed by this Court guarantee procedures in the state courts which are calculated to reach a just resolution of any material issue a defendant may seek to raise. They embody the concept of adequate state corrective process and, in view of these decisions, we think that this Court should now pronounce a corollary rule giving finality to state judgments rendered in satisfaction of the procedural requisites instead of allowing, as does the current practice, constant relitigation on the merits of contested issues of fact, even

where procedural fairness has been afforded to the defendant.

Affording finality to state court appellate opinions when the procedural requirements have been met, will encourage state appellate courts to determine constitutional issues on their merits. On the other hand, to deny finality to state appellate opinions removes any reason for state appellate courts to review federal constitutional issues.

Never has the imperative of finality in the administration of criminal justice been better explained than it was by Professor Paul M. Bator in his definitive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harvard Law Review 441 (1963). Professor Bator there pointed out the many undesirable results of undermining the finality of criminal judgments by allowing the relitigation of contested factual issues. Such relitigation undermines public confidence in the administration of criminal justice, tends to demoralize state trial and appellate judges, and saps the criminal law of its deterrent effect by clouding the certainty of punishment even after a judgment has been affirmed on appeal. Moreover it is totally at odds with any idea of rehabilitating criminal offenders. In Professor Bator's words, "the idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." *Id.* at 452.

Professor Bator proposes that for the purposes of federal habeas corpus, the detention of a state pris-

oner should not be deemed unlawful if based upon the judgment of a state court of competent jurisdiction which afforded the prisoner full corrective process, including a meaningful appeal, for the litigation and resolution of all issues he sought to raise involving his federal rights. A member of this Court has recently proposed a similar test:

> "One considered appeal is enough, in the absence of factors which show a possibility that substantial injustice has been inflicted on the defendant." *Wade v. Wilson*, ..... U.S. ....., 24 L.ed.2d 470 (1970), Black, J., dissenting.

Our proposal is also in accord with that recently expressed by another member of this Court in a somewhat different context.[14] While discussing the development of rules limiting the retroactive application of newly announced constitutional doctrines in criminal cases as an accommodation necessitated by the availability to state prisoners of federal collateral attack, Justice Harlan observed that federal habeas corpus, as presently constituted, serves two main purposes. First, it seeks to assure that no man is incarcerated

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[14]Justice Harlan proposes a test that if the District Court can say with assurance that, at the time of defendant's trial, this Court would have ruled against his contention even though it may have subsequently accepted his arguments, then the prisoner is not entitled to habeas corpus relief. *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J. dissenting). Since this Court previously entertained the issue of the voluntariness of defendant's statement on direct review of his conviction, we submit it can be said with absolute assurance at the time of defendant's trial this Court would have ruled against this contention, even if it subsequently accepted some of the defendant's arguments in other factual situations. *Compare Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting).

under a procedure which creates an impermissibly large risk that the innocent will be convicted. Secondly, the writ functions as an incentive to state courts to conduct their proceedings in accordance with constitutional guarantees. *Desist v. United States, supra.*[15] Whether a constitutional announcement of this Court is entitled to retroactive application on collateral attack by state prisoners should be resolved by determining whether the particular decision is an announcement of a "new" rule or merely the application of a settled, but previously unarticulated, concept. *Desist v. United States,* 394 U.S. 244, 261 (1969) (Harlan, J., dissenting.) Only where a constitutional ruling of this Court significantly improves the existing, fact-finding procedures is full retroactive application necessary to fulfill the purposes of the federal writ of habeas corpus.[16] In all other cases the function of the writ is discharged when the District Court applies the constitutional standards

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[15]The rule we propose would serve both purposes. Indeed, it would increase the incentive to the state courts to provide full appellate review.

[16]If the prisoner alleges that his trial was marred by a constitutional defect relating to the integrity of the fact finding process, his conviction would be vulnerable to collateral attack. However, without such an allegation the prisoner has alleged nothing which prevented the state trial and appellate courts from constituting an unbiased tribunal and therefore, the prisoner must bear a heavier burden if he is successfully to mount a collateral attack upon his conviction. *Compare Kaufman v. United States,* 394 U.S. 217, 235 (1969) (Black, J., dissenting), and *Justus v. New Mexico,* 378 F.2d 344 (10th Cir. 1967). There the 10th Circuit held that a prisoner's unrebutted testimony that he was forced to confess did not meet the burden of proof required to overcome the presumed correctness of the state court finding that the confession was not obtained by violence.

that prevailed at the time the trial took place. *Desist v. United States, supra.*

Applying this analysis to the present case, at the time of Atchley's trial and appeal, California had adopted and applied all the procedural safeguards thereafter announced by this Court. Under our proposed rule the District Court would have confined its review to the opinion of the California Supreme Court, and absent an alleged defect going to the integrity of the fact-finding or appellate process, such as a denial of counsel at trial or on appeal, or the failure to afford a transcript or its equivalent, would have deferred to the conclusions of the California Supreme Court.

**B. Conformity with the Intent of Congress**

We submit that our proposal for reform of current habeas corpus practice corresponds with the intent of Congress as expressed by the enactment of Section 2254(d). Although, it is our position that Section 2254(d) should be interpreted to cover state appellate court holdings (See Argument I, *supra,* p. 17), our proposed rule confers a presumptive validity to state appellate court opinions analogous to that presumption of correctness which section 2254(d) unquestionably gives to state trial court findings of fact. If, in this respect, our proposal goes beyond the actual statute, it is in accordance with the intent and concern expressed by Congress when that amendment was passed.

**C. Relief of Federal Court Dockets**

A modification of this Court's former opinions along the lines we propose would markedly relieve the crowded calendars of the federal district courts. Interpreting the present rules, the courts of appeals have held that the district courts may not rely on state court findings without undertaking an independent review of the record of the state trial court proceedings. *United States ex rel. Worlo v. Pate,* 411 F.2d 972 (7th Cir. 1969); *United States ex rel. Thomas v. Maroney,* 406 F.2d 992, 994-95 (3d Cir. 1968); *Maes v. Patterson,* 401 F.2d 200 (10th Cir. 1968); *Brown v. Crouse,* 399 F.2d 311 (10th Cir. 1968); *see also Piche v. Rhay,* ..... F.2d ..... (9th Cir. 1970); *Connor v. Wingo,* 409 F.2d 21 (6th Cir. 1969); *Canales v. Baker,* 406 F.2d 685, 686-87 (10th Cir. 1969); *Dentis v. Oklahoma,* 376 F.2d 590 (10th Cir. 1967). This burden devolves upon the federal district courts without regard to the length of the transcripts involved.[17] We think the Federal Courts ought to be relieved of this burden in cases where an examination of the face of the opinion of the state appellate court clearly shows that the habeas petitioner received a thoughtful consideration of his claim.

**D. Application of the Proposed Rule to this Case**

When the present habeas corpus proceedings are examined in the light of our proposed rule, it becomes clear that the District Court exceeded the proper

[17]It is commonplace in the handling of criminal appeals to find trial transcripts more than one hundred pages long and many transcripts, such as the present one, exceed two thousand pages.

scope of review by granting relief because petitioner's allegations merely raised a question of fact which had been decided against him by the trial court, whose decision was affirmed by the highest state appellate court in a proceeding whose fairness was and is unchallenged. In those proceedings, Atchley was afforded counsel, an unbiased trial court and full appellate review on the merits, in sum, the essence of fairness. As long as Atchley has had a constitutionally "fair" hearing, its "fullness" depended upon the relevant and material issues he wished to litigate at that time.

Under our proposed rule defendant's only claim which would entitle him to review in federal habeas corpus concerns the failure of the trial court to comply with the requirements of *Jackson v. Denno, supra*. As noted above, this finding is without support in this record (*supra*, pp. 22-23). The District Court's reasons for concluding that the facts were not fully developed at the hearing in the trial Court had been anticipated by the California Supreme Court and found to be without merit. Thus, the District Court should have denied the writ after reviewing the opinion of the California Supreme Court.

This procedure would be far preferable than the present practice of reviewing the merits of state court findings. Rather than the expansion of the fact finding function on habeas corpus (*Cf. Townsend v. Sain, supra*), extreme restraint in ordering evidentiary hearings is called for, particularly in view of the fact that habeas corpus petitions, as evidenced by the instant case, are often filed many years after convic-

tion, when prosecution has become impractical because witnesses are no longer available, memories have faded and other evidence has disappeared. See Symposium, Habeas Corpus—Proposal for Reform, 9 Utah L. Rev. 18, 41 (1964). The problems arising from insistent relitigation can be solved with some degree of success if district courts are directed to consider the fact finding processes, evidentiary rulings, and evaluations of the state courts and their appellate opinions well nigh conclusive and irrebutable, thereby concentrating the district court's efforts on the correction of serious errors in the state court's understanding and interpretation of federal constitutional law. To this end we urge this Court to adopt our proposed limitation of collateral review of state court findings.

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## III

### THE FEDERAL DISTRICT COURT HAS ORDERED THE CALIFORNIA COURTS TO HOLD A HEARING IN EXCESS OF THEIR JURISDICTION

The Federal District Court, choosing to employ the "procedure of convenience" outlined in *Jackson v. Denno,* 378 U.S. 368 (1964), ordered the state to hold a hearing on the voluntariness of Atchley's statement or suffer reversal of his conviction.

We concur with the District Court's conclusion that if a hearing upon the issue of voluntariness is necessary, it should be held in the state courts. However, Atchley's judgment of conviction has long since be-

come final in the California courts. There is, at this time, no state court possessed of jurisdiction over this cause to hold the hearing envisioned by the District Court's order. The necessary jurisdiction can be conferred upon a California court pursuant to its habeas corpus jurisdiction (Calif. Const., Art. VI, § 10), if an application is made at the instance of the prisoner. Cal. Pen. Code, § 1474. There is no procedure in California whereby the People can properly initiate such a hearing.

Attempts to do so in other jurisdictions have resulted in confusion and litigation.[18] We believe that the procedure outlined in *Jackson v. Denno, supra,* should be understood to require the prisoner to commence the proceedings in the state courts where that is required to invest them with jurisdiction.

Regardless of the forum in which these hearings are held, they remain evidentiary hearings whose purpose is to resolve an issue raised on collateral attack. Hence, the burden of proof remains upon the prisoner whether he or the state initiates the hearing.

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[18]*Compare, Williams v. Beto,* 386 F.2d 16, 17-19 (5th Cir. 1967), where Williams claimed the findings of the state court after such a hearing were invalid because that court had acted without jurisdiction.

## CONCLUSION

Louis S. Nelson,[19] Warden, California State Prison, San Quentin, California, respectfully requests this court to remand the case to the Ninth Circuit Court of Appeals with directions to reverse the order of the District Court granting the writ, and to direct the Court of Appeals to order the District Court to deny Atchley's petition for the writ of habeas corpus.

Dated, April 9, 1970.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 44

R. K. PROCUNIER,
Director of the California Department of Corrections
*Petitioner,*

vs.

VERON ATCHLEY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 642

R. K. PROCUNIER,
Director of the California Department of Corrections
*Petitioner,*

vs.

VERON ATCHLEY,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR RESPONDENT

## QUESTIONS PRESENTED

1. Was respondent Veron Atchley's confession involuntary as a matter of law?

2. Was the District Court correct in deciding that the trial court hearing on the involuntary confession was constitutionally inadequate?

3. Was the District Court correct in deciding that respondent Veron Atchley had rebutted the presumption of 28 U.S.C. § 2254(d)?

4. Will federal courts continue to examine the constitutionality of trial court convictions in compliance with principles defined by this Supreme Court?

5. Was the District Court correct in deciding that any further hearing on respondent's involuntary confession be provided by the State under the procedures defined by this Supreme Court in *Jackson v. Denno*?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent Veron Atchley's confession was involuntary, in violation of Section 1 of Amendment XIV of the Constitution of the United States, which provides in relevant part as follows:

> "nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

The trial court hearing on respondent's involuntary confession was also in violation of that section of Amendment XIV.

The State's argument is based in part on 28 U.S.C. § 2254(d), which is set forth in full in the appendix to this brief. That subsection must be considered in the context of Chapter 153, "Habeas Corpus," of Title 28 of the United States Code.

## STATEMENT OF THE CASE

### Atchley's Involuntary Confession

Respondent Veron Atchley[1] is of low natural intelligence, with an Intelligence Quotient of 60.[2] He also suffers from damage to his brain and central nervous system from a

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[1]Through the transcript, Atchley is often referred to by his nickname "Jack."

[2]Single Appendix 20. That appendix is hereafter cited as "A".

blow received approximately two years before his trial.[3] Atchley was raised in the mountain country of Tennessee, of a farm family of twelve children.[4] Going to school for only three or four months a year, he managed to complete the third grade.[5] He cannot read or write anything except his own name. All papers have to be read to him.[6]

Atchley was arrested for the murder of his wife. While under arrest by the police, he was kept occupied and isolated.[7] He was forty-eight hours without sleep.[8] He wanted to sleep, but he was either prevented from sleeping[9] or the jail was such that he could not sleep.[10] He was in the highest state of shock.[11]

He requested an attorney eight or ten times,[12] but was not allowed to see an attorney until after his confession. He was not advised of his legal rights.

Atchley was visited in jail by Mr. Roy J. Travers.[13] Mr. Travers was his friend and his insurance agent. But Travers had also been a deputy sheriff for three and a half years, investigating homicides for two years.[14] Atchley and Travers discussed the life insurance on Atchley's deceased wife.[15]

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[3]A. 20.

[4]A. 180-1.

[5]A. 186.

[6]A. 48, 186-7.

[7]A. 104.

[8]A. 197, 189.

[9]A. 206.

[10]A. 198-9.

[11]A. 196-7

[12]A. 154-5, 189-90, 206.

[13]A. 141 et seq.

[14]A. 172-3.

[15]A. 143, 149-51.

Atchley was concerned about their children receiving the insurance proceeds, and Travers indicated he needed facts from Atchley for purposes of that insurance.[16]

After leaving Atchley, Travers was asked by a deputy sheriff to return for another interview with Atchley. The deputy wanted the second interview to be secretly recorded.[17] At the request of the officer, Travers returned for the second interview to make the secret recording. This time Travers took the initiative and asked Atchley questions, not just about the insurance but also about the shooting.[18] In his questioning of Atchley, Travers used the same interrogation techniques as when he was a deputy sheriff working on homicides.[19] Travers led Atchley to believe that he needed the information for the insurance.[20] Atchley was the primary or final beneficiary under the policy,[21] and the subject of the insurance was mentioned approximately nine times during the recorded interview.[22] Travers told Atchley that he would not write anything down.[23] Atchley knew nothing of the recording being made and believed that his interview with Travers was private and confidential.[24] Under this questioning by Travers, Atchley made many statements regarding the death of his wife.[25]

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[16]A. 142-3, 148, 149-51, 159.

[17]A. 155-6, 163-4.

[18]A. 172-4.

[19]A. 172-4.

[20]A. 95, 96, 98, 100, 105.

[21]A. 144, 159.

[22]A. 95, 96, 98, 100, 102, 103, 104, 105.

[23]A. 97.

[24]A. 89, 146, 156-7.

[25]A. 95-105.

## State Court Conviction

During Atchley's trial, the tape recording was offered in evidence.[26] Atchley objected that it was an involuntary confession.[27] But the recording was admitted into evidence and played to the jury.[28] The recording was also used extensively to impeach Atchley's testimony.[29] Atchley was convicted. And again the recording was introduced against him, this time in the hearing on his sentence.[30] Atchley was sentenced to death.

## Federal Court Proceedings

After exhausting his other available remedies,[31] Atchley filed a petition for habeas corpus in the District Court.[32] After pleadings and hearings, the District Court held that the trial court proceedings were unconstitutional.[33] The District Court said:

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[26] A. 86-87, 160.

[27] A. 86-160. The hearing on the confession is discussed on pp. 18-30 of this brief.

[28] A. 160.

[29] A. 199-205. Reporter's Transcript 1638, 1670-83, 1725-6, 1757-8. The Reporter's Transcript has been lodged with the Court, and is hereafter cited "R.T."

[30] A. 207-8.

[31] Appeal to the California Supreme Court, *People v. Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959); petition for certiorari to the United States Supreme Court, *Atchley v. California*, 366 U.S. 207 (1961); denial of habeas corpus, *Atchley v. Dickson*, 338 F.2d 1014 (9th Cir. 1964); reduction of his death sentence to life imprisonment, A. 19-22; and habeas corpus in the state courts, A. 69.

[32] A. 7 et seq.

[33] A. 68-79.

> ". . . it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary."[34]

The District Court directed the State to provide either a new hearing on voluntariness or a new trial, or Atchley would be entitled to his release.[35]

The State appealed. The United States Court of Appeals affirmed the judgment of the District Court.[36] The State then petitioned this Court for a writ of certiorari.

## SUMMARY OF ARGUMENT

Atchley is an illiterate man with low natural intelligence and permanent brain damage. The police extracted a confession of murder from him.

The confession was vital to Atchley's conviction and sentence to death. The confession was his first statement to the police that he had brought the gun to the scene of the shooting, had waited for his wife to arrive, and had intended to scare her. The playing of the confession to the jury was vital evidence to the jury's finding of guilt. It was not only important to Atchley's guilt or innocence, but also to the degree of guilt under the numerous theories submitted to the jury. The confession was used against him several times, and the trial and confession resulted in his conviction for murder and his sentence to death.

The confession was involuntary as a matter of law. When the confession was obtained, Atchley had been denied an attorney several times. He had not been advised of his legal rights. He had not slept for forty-eight hours and was in a state of shock. The confession was then

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[34] A. 76.

[35] A. 78-9.

[36] A. 80-85.

extracted by the deceit of a friend: Atchley was tricked into discussing the death with his friend, an insurance agent, by the deceit that the information was needed to obtain insurance money for Atchley's children. During that private discussion, the confession was secretly recorded.

The trial court hearing on Atchley's involuntary confession was also constitutionally inadequate. The trial judge did not decide whether the confession was voluntary or involuntary. The hearing was conducted in the presence of the jury. And relevant evidence on the involuntary confession was excluded by the trial judge.

The State's arguments to this Court present no basis for reversal of the judgments of the District and Circuit Courts:

The State contends that the District Court *refused* to apply the presumption of 28 U.S.C. § 2254(d). The District Court did not refuse to apply the presumption. The court expressly found that the presumption had been rebutted. The court was correct. And further, Atchley's confession was within the exceptions to the presumption.

The State's principal objective is reversal of this Court's numerous decisions that federal courts should examine the constitutionality of trial court convictions. The State wants the protections provided by the federal courts virtually eliminated. This Court cannot accept the State's objective without abdicating its constitutional duties to fifty separate, geographically diverse, and procedurally diverse state court systems. This Court's prior decisions on federal courts examining the constitutionality of trial court convictions are correct and should be affirmed.

The State finally argues that if a hearing is to be held on the involuntariness of Atchley's confession, he should petition the State for that hearing. But the procedures defined by this Court in *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S.Ct. 1774 (1964), direct the State to provide the necessary hearing.

* * *

On behalf of Atchley, we contend that the judgments of the District Court and Court of Appeals should be modified to provide that (1) Atchley's confession was involuntary as a matter of law, and (2) he should have a new trial; and as so modified, those judgments should be affirmed. At the very least, the judgments of the courts below granting Atchley a new hearing on the involuntariness of his confession should be affirmed in their present form.

## ARGUMENT

### Atchley's Confession Was Vital to His Conviction and Sentence to Death

In the days after his arrest, Atchley told several versions of the death of his wife: (1) He first denied knowledge of her death, a denial he twice made to the police.[37] (2) Later, Atchley admitted being at the scene, but said that his wife had brought the gun and that she had been killed in a struggle.[38] (3) In the recorded statement, Atchley said that he had brought the gun to the scene, that he had waited for his wife to arrive, that he had intended to scare her, and that several shots had been fired while the gun was in his hand.[39] That recorded confession was vital to Atchley's conviction and sentence to death.

It was vital to the police investigation and prosecution. It was the first time the police heard Atchley say that he had brought the gun to the scene of the shooting, had waited for his wife to arrive, and had intended to scare her. Its importance to the police and prosecution is evident from the fact that the recording was made and used extensively during the trial.

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[37]R.T. 836-9, 759-65.

[38]R.T. 775-8.

[39]A. 95-105.

It was even more vital to the jury. The playing of the recording was the first time the jury heard that Atchley had gone to the scene to scare his wife. This was important to whether the jury believed Atchley's basic defense that her death resulted from an accidental struggle. The California Supreme Court expressed its agreement that "it was critical whether the jury believed [Atchley's] story of a struggle for the gun."[40] Its significance to the jury was further enhanced by the numerous times the State used it to impeach Atchley's testimony.[41]

Not only was the confession vital to Atchley's guilt or innocence, it was pivotal to the *degree* of guilt. The case was tried and submitted to the jury on several theories: deliberate and premeditated murder, murder by lying in wait, second degree murder, manslaughter, justifiable homicide, and self defense.[42] Atchley's recorded statements of bringing the gun to the scene, waiting for his wife, and intending to scare her were vital to these degrees of guilt. The jury apparently attached great weight to the confession, since it found Atchley guilty of murder in the first degree and imposed the death penalty.

The State's brief makes extensive reference to the different versions of the death which Atchley told.[43] But the important point is that there *were* differences between the confession and his prior statements to the police. And that confession was vital to the police and prosecution in obtaining his conviction and death sentence.

The State then attempts to support the recorded confession by referring to other statements which might corroborate it.[44] There are several answers to the State's attempt.

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[40]A. 66.

[41]See footnote 29.

[42]Clerk's Transcript 126 et seq. The Clerk's Transcript has been lodged with the Court, and is hereafter cited "C.T."

[43]Petitioner's Brief, pp. 4-9.

[44]Petitioner's Brief, 9-10.

First, there were material differences in the statements. For example, in one statement cited by the State (p. 9), Atchley did not admit going to the scene for the purpose of scaring his wife.[45] Second, the allegedly corroborating statements were not made until *after* the recorded confession had been made and the police knew about it.[46] And Atchley did not testify at the trial until *after* the confession had been played to the jury. To both the police and the jury, the confession was a vital link in the chain of conviction. Third, the State's attempt to corroborate the confession is contrary to numerous decisions of this Court. This Court has held that if an involuntary confession is used, there is a violation of due process which requires reversal—even if there were other confessions and other evidence sufficient to prove guilt. For example: In *Greenwald v. Wisconsin*, 390 U.S. 519, 20 L. Ed. 2d 77, 88 S.Ct. 1152 (1968), there was a series of admissions; in *Darwin v. Connecticut*, 391 U.S. 346, 20 L. Ed. 2d 630, 88 S.Ct. 1488 (1968), there was a series of confessions; in *Haynes v. Washington*, 373 U.S. 503, 10 L. Ed. 2d 513, 83 S.Ct. 1336 (1963), there was "substantial independent evidence tending to demonstrate guilt"; in *Spano v. New York*, 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S.Ct. 1202 (1959), there was "sufficient other evidence in the record"; in *Gallegos v. Colorado*, 370 U.S. 49, 8 L. Ed. 2d 325, 82 S.Ct. 1209 (1962), the "basic ingredients of the confession came tumbling out as soon as he was arrested"; in *Leyra v. Denno*, 347 U.S. 556, 98 L. Ed. 948, 74 S.Ct. 716 (1954), there were subsequent confessions; in *Culombe v. Connecticut*, 367 U.S. 568, 6 L. Ed. 2d 1037, 81 S.Ct. 1860 (1961), there were several confessions; in *Reck v. Pate*, 367 U.S. 433, 6 L. Ed. 2d 948, 81 S.Ct. 1541 (1961), there were two confessions. Yet in each of those cases this Court found one confession involuntary and reversed the convic-

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[45] R.T. 840-50.

[46] R.T. 874-6.

tions. If an involuntary confession is used, other confessions or other evidence of guilt will *not* support the conviction.

Regardless of other evidence, consistent or inconsistent, Atchley's recorded confession was vital to his conviction and to his death sentence.

## Atchley's Confession Was Involuntary As a Matter of Law

### *An Involuntary Confession Is a Violation of Due Process*

An involuntary confession is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. As stated in *Jackson v. Denno*, at 376:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession . . ."

The reasons for that axiom have been defined by this Court:

> "It is now unescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the '*strongly felt attitude of our society that important human values are sacrificed* where an agency of the government, in the course of securing a confession, wrings a confession out of an accused against his will,' *Blackburn v. Alabama*, 361 U.S. 199, 206-207, 4 L. Ed. 2d 242, 248, 80 S.Ct. 274, and because of 'the deep-rooted feeling that the *police must obey the law while enforcing the law;* that in the end *life and liberty can be as much endangered from illegal methods used to convict those thought to be crimi-*

> *nals as from the actual criminals themselves.' Spano v. New York,* 360 U.S. 315, 320-321, 3 L. Ed. 2d 1265, 1270, 79 S.Ct. 1202." *Jackson v. Denno,* 385-6. (Emphasis added) Accord: *Haynes v. State of Washington,* 519.

This Court has applied its decisions on involuntary confessions retroactively. The Court's making them retroactive is express recognition of the danger of involuntary confessions convicting the innocent, and of the gravity of involuntary confession cases; *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S.Ct. 1772 (1966), at 727-30; *Linkletter v. Walker,* 381 U.S. 618, 14 L. Ed. 2d 601, 85 S.Ct. 1731 (1965), at 639; *Davis v. North Carolina,* 384 U.S. 737, 16 L. Ed. 2d 895, 86 S.Ct. 1761 (1966), at 740.

### *Atchley's Confession Was Involuntary As a Matter of Law*

In protecting against involuntary confessions, the Court has used various language to define when a confession is involuntary. The Court has said that a confession is involuntary when: the accused's will has been overborne; or the confession is not the product of a rational intellect; or it is not the result of the exercise of free choice; or it is the end product of coercive influences; *Jackson v. Denno,* at 390; *Davis v. North Carolina,* at 752; *Reck v. Pate,* at 440-1; *Culombe v. Connecticut,* at 602.

Whatever the words used by the Court, the message is clear: a confession must be a voluntary act. And by whatever words it is measured, Atchley's confession was involuntary.

Atchley is a man of sub-standard intelligence with brain damage. He was unable to read or write anything except his own name. After his arrest for murder, he was without sleep for forty-eight hours and was in a state of shock. He was kept isolated. He requested an attorney several times, but an attorney was denied him until after he confessed.

He was not advised of his rights. And he was finally deceived into making a confession by a friend whom the police recruited. The confession was secretly recorded. The deceit used to obtain the recorded confession even included an offered reward; that is, if Atchley would give Travers the facts, Atchley's children would get insurance money.

Those facts are easily measured against the standards defined by this Court. Most important are two recent decisions, after the District Court's decision in this case:

In *Greenwald v. Wisconsin*, the Court reversed a conviction because of an involuntary confession. The Court held the confession to be involuntary because of three facts (521):

(1) "the lack of counsel, especially in view of the accused's statement that he desires counsel;"

(2) "the lack of food, sleep and medication;" and

(3) "the lack or inadequacy of warnings as to constitutional rights."

Each of these facts also applies to Atchley's involuntary confession. The Court said about these facts:

> "Considering the totality of these circumstances, we do not think it credible that petitioner's statements were the product of his free and rational choice. Accordingly, the [conviction] below is reversed." (521)

In *Darwin v. Connecticut*, this Court again reversed a conviction because of an involuntary confession. The Court held the confession involuntary because the accused's attorney had made attempts to communicate with him, while he was kept incommunicado for thirty to forty-eight hours (349). The Court said that was enough to make the confession involuntary:

> "Considering the 'totality of the circumstances,' we conclude that the court erred in holding that the confession and the partial reenactment were voluntary." (349)

Atchley's circumstances are even more extreme. In addition to the other injustices surrounding his confession, Atchley asked for and was denied a lawyer eight or ten times.[47]

Other decisions of the Court support the results of *Greenwald* and *Darwin*.[48] The Court has enumerated several factors showing when a confession is involuntary. Each of the factors applies to Atchley:

(1) The accused must not be denied an attorney. The Court has held that although its rulings in *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S.Ct. 1758 (1964), and *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602 (1966), are not alone retroactive, they are retroactive to the involuntariness of a confession; *Darwin v. Connecticut*, at 349; *Johnson v. New Jersey*, at 730; and *Davis v. North Carolina*, at 740.

In regard to the police denying Atchley an attorney, we believe that recent holdings of this Court lead to an important conclusion: if an accused is denied an attorney, his confession *must* be deemed involuntary for that reason alone. This conclusion was implied in the Court's opinions in *Greenwald* and *Darwin*. And this was the Court's holding in *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S.Ct. 1199 (1964). In *Massiah* the accused was indicted, retained a lawyer, pleaded not guilty, and was released on bail. While free on bail and without the presence of his counsel, the accused conversed with a co-defendant, unaware that the co-defendant had permitted government agents to record their conversation. His conviction was reversed on the ground that his right to counsel had been violated by that recording outside the presence of his lawyer. *Massiah* was affirmed in *Beatty v. United States*, 389 U.S. 45, 19 L. Ed. 2d 48, 88 S.Ct. 234

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[47] A. 154-5, 189-90, 206.

[48] *Greenwald* and *Darwin* are similar to this case for another reason: they involved trials prior to the Court's decisions in *Escobedo* and *Miranda*; see *infra*. Yet the Court reversed both convictions.

(1967); see also *Spano v. New York,* 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S.Ct. 1202 (1959) (concurring opinion). The right of an accused to counsel is protected by the Constitution and this Court. So is the right of an accused to be free from coercion of his confession. These two rights come together at one point: if an accused is denied counsel, his confession must be deemed involuntary for that reason alone. Such was the situation with Atchley, whose frequent requests for an attorney were denied until after he confessed.

But we need not base Atchley's position on just that point; there are additional factors in his involuntary confession:

(2) Atchley was not advised of his right to remain silent or of his other constitutional protections. This fact also indicates that the confession was involuntary; *Greenwald v. Wisconsin; Davis v. North Carolina;* and *Haynes v. Washington,* at 516-7.

(3) The inducement for Atchley's confession is also compelling. Atchley thought he was giving Travers information which Travers needed to obtain insurance money for the children. In *Malloy v. Hogan,* 378 U.S. 1, 12 L. Ed. 2d 653, 84 S.Ct. 1489 (1964), the Court repeated its rule that a confession must not be:

> ". . . obtained by any direct or implied promises, however slight . . ." (p. 7)

Here, the inducement of financial gain for Atchley's talking was *express.* The insurance was mentioned approximately nine times during the recorded confession; see footnote 22.

(4) Another important factor is an accused's intelligence and capacity to resist; *Spano v. New York; Culombe v. Connecticut; Reck v. Pate; Davis v. North Carolina.* Atchley was illiterate, had an I.Q. of 60, and suffered from brain damage. His intelligence and capacity for resistance were far below the accuseds in the cited cases.

(5) The fact of Travers deceiving Atchley is also significant. Atchley was talking in confidence to his friend and trusted adviser about insurance money. But Travers had been recruited by the police to talk with Atchley for a different purpose. The obtaining of a confession by the use of *any* deceit has been criticized by this Court. It condemned similar deceits in *Leyra v. Denno, Massiah v. United States,* and *Lisenba v. California,* 314 U.S. 219, 86 L. Ed. 166, 62 S.Ct. 280 (1941). In *Spano v. New York* this Court included within its criticism a quotation which is particularly applicable here (323):

> "An open foe may prove a curse,
> But a pretended friend is worse."

(6) A final factor is the Court's decision in *Katz v. United States,* 389 U.S. 347, 19 L. Ed. 2d 576, 88 S.Ct. 507 (1967), that there is a violation of constitutional rights in secretly recording a confidential communication without prior judicial approval. That decision must contribute to the involuntariness of Atchley's confession.[49]

A confession is determined to be involuntary by the totality of all of the circumstances; *Clewis v. Texas,* 386 U.S. 707, 18 L. Ed. 2d 423, 87 S.Ct. 1338 (1967); *Darwin v. Connecticut; Greenwald v. Wisconsin; Culombe v. Connecticut.* Here, the totality is overwhelming: a mentally inferior accused; isolated without sleep for forty-eight hours and in shock; denied an attorney (which fact alone should be conclusive); not advised of his constitutional rights; a confession secretly recorded by the deceit of a friend; and the confession obtained by the inducement of insurance money.

We submit that the confession is involuntary as a matter of law; and that the judgment of the District Court should

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[49]The State cannot distinguish *Katz* with its argument that Atchley's statements were knowingly exposed to some outsider (Petitioner's Brief, 20). Both Atchley and Katz were obviously talking to *somebody* when their words were secretly recorded by the police.

be modified to require a new trial, and as so modified, affirmed. In asking the Court to rule as a matter of law, we do so in awareness of the Court's recent decision in *Sigler v. Parker,* ___ U.S. ___, 24 L. Ed. 2d 672, 90 S.Ct. ___ (1970). The Court there reversed a Court of Appeals finding that a confession was involuntary, and directed that a hearing be held by the state under *Jackson v. Denno,* However, we respectfully submit that the *Sigler* decision does not preclude the result we ask in this case:

First, the primary issue in *Sigler* was not that the confession was involuntary. Rather, *Sigler* was a *procedural* decision that the trial court's hearing on involuntariness had been constitutionally inadequate. In correcting that procedural deficiency, the proper remedy was to refer the matter back to the state to correct the procedure. However, our point here is *substantive.* That is, we believe that from the record Atchley's confession was involuntary as a matter of law. Indeed, the State itself argues that there are no questions of fact.[50]

Second, courts often hold that issues can be decided as a matter of law and need not be decided factually. These decisions occur frequently in the judicial process, in rulings upon such matters as demurrers, motions to dismiss, and summary judgments. And appellate courts frequently make rulings as a matter of law without the necessity for further lower court proceedings. The point is that sometimes the established facts and the law combine to compel a conclusion which no further evidence could refute. This Court has made such determinations as a matter of law in confession cases. For example, in both *Darwin v. Connecticut* and *Greenwald v. Wisconsin,* the Court concluded that the confessions were involuntary and reversed the convictions. We believe that that is the situation in Atchley's case. The factors enumerated above, which are already established in the record, compel the conclusion that the confession was involuntary as a matter of law.

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[50]Petitioner's Brief, 23-24.

## The Hearing on the Involuntary Confession Was Constitutionally Inadequate

Even if Atchley's confession is not held involuntary as a matter of law—as we believe it should be—the judgments of the lower courts should still be affirmed. The judgments should be affirmed because the hearing on the involuntary confession was constitutionally inadequate.

The District Court expressly ruled that:

> "the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary. The hearing on voluntariness was not fully adequate . . ."[51]

The District Court ordered the State to provide a new hearing on voluntariness.[52] That decision was correct and should be affirmed.

### *An Accused Must Receive a Constitutionally Adequate Hearing on the Voluntariness of His Confession*

This Court has directed that when an accused raises the involuntariness of his confession he must receive a hearing. That hearing must be a fair one, in which the issue of involuntariness is squarely presented and resolved. As the Court said in *Jackson v. Denno*, at 380:

> "A defendant objecting to the admission of a confession is entitled to a *fair hearing* in which both the underlying factual issues and the voluntariness of his confession are *actually and reliably determined.*" (Emphasis added)

And at 390:

> "Expanded concepts of fairness in obtaining confessions have been accompanied by a correspond-

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[51] A. 76.

[52] A. 78.

> ingly greater complexity in determining whether an accused's will has been overborne—facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative. The over-all determination of the voluntariness of a confession has thus become an *exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation* and unbeclouded by other issues and the effect of extraneous but prejudicial evidence." (Emphasis added)

Atchley's hearing was constitutionally inadequate, for three separate reasons. First, the trial judge did not decide whether the confession was voluntary or involuntary, as required by *Jackson v. Denno* and subsequent cases. Second, the hearing was conducted partially in the presence of the jury. And third, the hearing excluded evidence relevant to involuntariness. Any one of these factors alone would require a new hearing; here, they are all present. We will discuss each in order.

*Atchley's Hearing Was Constitutionally Inadequate Because the Trial Judge Did Not Decide Whether the Confession Was Voluntary or Involuntary*

This Court requires that a decision on the voluntariness of a confession must be made by the trial judge; *Jackson v. Denno.* In *Sims v. Georgia,* 385 U.S. 538, 17 L. Ed. 2d 593, 87 S.Ct. 639 (1967), the Court said that the trial judge's decision "must appear from the record with unmistakable clarity" (544); accord, *Sigler v. Parker.*

The trial judge did not make such a decision here. Instead, the judge simply admitted the confession into evidence with no decision on voluntariness and with no guidance to the jury. This is demonstrated by the record:

Atchley's counsel objected to the recording[53] and raised the issue of involuntariness.[54] There was then a hearing on the confession in the judge's chambers.[55] The tape was played for the judge,[56] and he recognized that the statements on the recording were to be treated as a confession.[57] He directed that the jury be reconvened and a foundation be laid before the recording was played.[58] The judge had *not* ruled upon voluntariness when the hearing in chambers ended; indeed, the hearing had not then been completed.

The hearing then continued before the jury.[59] Travers testified to lay the foundation.[60] There was then some limited cross-examination.[61] The jury heard both the foundation and the cross-examination, which were obviously on the issue of voluntariness. The jury also heard evidentiary objections and rulings.[62] The recording was then played to the jury.[63] It was offered in evidence, and the trial judge simply said that Atchley's objections "are noted and the Court has ruled upon them."[64] The testimony regarding the confession then continued and was merged into

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[53]A. 86, 159, 160.

[54]A. 86-140.

[55]A. 86 et seq.

[56]A. 95-107.

[57]A. 127, 131. The California Supreme Court agreed that the recording was to be treated as a confession for purposes of voluntariness; *People v. Atchley*, A. 54-6.

[58]A. 127, 131-2.

[59]A. 140.

[60]A. 140-5.

[61]A. 146-159.

[62]A. 140-160.

[63]A. 160

[64]A. 160.

the other evidence.[65] The record contains no statement showing that the judge determined the confession to be "voluntary" or "involuntary." Finally, the jury was not given any instructions on the voluntariness or involtunariness of the convession.[66]

What was the net result? The jury heard the confession. They listened to conflicting evidence on whether it was involuntary. They heard it admitted into evidence, but they were not told whether the judge had found it voluntary. They probably interpreted the judge's "noting" of objections as simply a ruling on the *evidentiary* objections they had heard. They listened to the evidence on the confession continue and were not informed of the conclusion. They were not given any instructions pertaining to the confession. The jury would logically assume that the confession, and the issue of its involuntariness, had been presented *to them*, along with all of the other evidence and issues. We can never know what decision the jury reached on involuntariness, since they simply wrapped up all of the issues in a general verdict. This is precisely the procedure which *Jackson v. Denno* held unconstitutional.[67] All of the evils condemned by *Jackson v. Denno* (380 and footnote 12) are present here.

This same procedure was again condemned by the Court in *Boles v. Stevenson*, 379 U.S. 43, 13 L. Ed. 2d 109, 85 S.Ct. 174 (1964): A confession was offered at trial. The defense moved to strike it as involuntary. The motion was overruled without comment and without a ruling on the involuntariness. The Supreme Court held that the procedure was improper (45):

> "In light of this practice, we cannot ascertain on this record whether the trial judge declined to hold a hearing and *declined to rule explicitly on volun-*

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[65]A. 160 et seq.

[66]C.T. 126 et seq.

[67]The Court has held that *Jackson v. Denno* applies retroactively; see pages 12 above and 33 following.

> *tariness* because he thought there could not be any issue in the light of defendant's not guilty plea, because he thought the confession was in fact voluntary, or because he thought the *objections were inadequate or untimely. Hence we do not know if the trial judge decided voluntariness, one way or the other, and, if he did, what standard was relied upon.* We think the procedures were not 'fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession.'" (Emphasis added)

And later, this Court spoke again in *Sims v. Georgia.* As here, there was no actual ruling in the *Sims* record showing that the trial judge determined voluntariness (541). The confession was presented to the jury without giving them a ruling by the judge (542). The Court said:

> "This is the exact procedural device which is proscribed by the rule in *Jackson.*" (542)

The Court emphasized that although the trial judge need not make formal findings of fact or write an opinion,

> "his conclusion that the confession is voluntary *must appear from the record with unmistakable clarity.*" (544) (Emphasis added)

In *Pinto v. Pierce*, 389 U.S. 31, 19 L. Ed. 2d 31, 88 S.Ct. 192 (1967), the Court cited its prior holdings that (32):

> ". . . a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness . . ."

Most recently, the Court made the same decision in *Sigler v. Parker.*

The record in Atchley's case discloses no decision by the trial judge on the voluntariness of his recording. The State argues that the judge's admitting the confession into evi-

dence and saying that objections "are noted and the Court has ruled upon them" was a finding of voluntariness.[68] But that is not constitutionally adequate for several reasons. First, this is hardly the "unmistakable clarity" required by *Sims*. Second, admitting the confession into evidence was not sufficient to constitute a ruling on voluntariness in *Sims*, *Boles*, or *Sigler*. And in *Jackson v. Denno*, the Court said (footnote 8) that the judge's conclusions and findings must be express or ascertainable from the record. Finally, the judge's statement that he "has ruled upon"[69] the objections was incorrect if meant to apply to the voluntariness of the confession: he had made *no* prior ruling that the confession was voluntary. His statement was at best misleading, because of the many *evidentiary* objections the jury had just heard.[70] We wish to emphasize to the Court the impact upon the jury: The jury heard conflicting testimony on whether the confession was involuntary. It heard other objections. It heard the confession. Then all it heard from the judge was that the objections were "noted" and had been "ruled upon." Having heard the confession, the evidentiary objections, the conflicting evidence on involuntariness, and all of the other evidence in the lengthy trial, the jury was left to bring in a general verdict without any instructions on the confession. This is what *Jackson v. Denno* condemns.[71]

The State argues[72] that the California procedure at the time of Atchley's trial was the so-called "Massachusetts rule." That is, the judge was to make the initial determina-

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[68]Petitioner's Brief, 16. A. 160.

[69]A. 160.

[70]A. 140-160.

[71]We do not contend that in all cases the jury must be specifically told of the judge's ruling. But the judge must in fact rule.

[72]Petitioner's Brief, 22-3.

tion as to involuntariness, and if there was an issue, was to submit it to the jury with instructions on their final power; *People v. Bevins*, 54 Cal. 2d 71, 77, 351 P.2d 776 (1960). However, that is *not* what was done in Atchley's trial. The trial judge made no ruling on voluntariness, and he did not instruct the jury that they had a role to perform. The State can hardly contend that Atchley's trial was proper when the procedures required by the State and *People v. Bevins* were not followed.[73]

The State also argues that Atchley's counsel did not request instructions on the confession.[74] But the burden to give adequate instructions on the confession was on the trial court. In *People v. Bevins* the California Supreme Court said (77):

> "... while it was within [the trial judge's] discretion to permit the confession to be read to the jury, *he was also required to submit to the jury for its determination under proper instructions the question whether under all the circumstances the confession was made freely and voluntarily.*"

This decision that the trial court *must* give appropriate instructions has been followed in subsequent cases by the California Supreme Court; e.g., *People v. Lara*, 67 Cal. 2d 365, 432 P.2d 202 (1967); *People v. Eli*, 66 Cal. 2d 63, 424 P.2d 356 (1967); *People v. Sanchez*, 65 Cal. 2d 814, 423 P.2d 800 (1967).

The State finally argues that there was no conflict in the evidence and therefore no need to submit the issue of involuntariness to the jury.[75] The State is incorrect.

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[73]The District Court inferred this in footnote 7 of its opinion, A. 78.

[74]Petitioner's Brief, 11, 23.

[75]Petitioner's Brief, 23-24.

Because there was substantial evidence from which the jury could find that the confession was involuntary, that issue had to be submitted to the jury under the State's procedure. The facts discussed on pages 12 through 16 above are certainly such substantial evidence of involuntariness. And as we have stated, we believe that those facts are so compelling as to require a ruling of involuntariness as a matter of law.

Further, since the trial judge did not rule upon the voluntariness or involuntariness of the confession, he had to submit the issue to the jury so that *someone* could decide.

We are left with the simple fact that the omission condemned by *Jackson v. Denno* was committed here. The trial judge made no decision on the issue of involuntariness. And that omission was compounded by the fact that the jury received no instructions on what function they were to perform with respect to the contested confession.

### *The Hearing Was Constitutionally Inadequate Because It Was Conducted in the Presence of the Jury*

The hearing on involuntariness was also improper because it was conducted partially in front of the jury.

The Court said in *Jackson v. Denno* that the hearing on involuntariness should not be before the jury which hears the question of guilt or innocence:

> "[The accused contends] that the issue of his confession should not have been decided by the convicting jury but *should have been determined in a proceeding separate and apart from the body trying guilt or innocence.* So far *we agree* and hold that he is now entitled to such a hearing in the state court." (394) (Emphasis added)
>
> "It is both practical and desirable that in cases to be tried hereafter *a proper determination of voluntariness be made prior to the admission of the confes-*

*sion to the jury which is adjudicating guilt or innocence.*" (395) (Emphasis added)

"Whether the trial judge, or another judge, or another jury, *but not the convicting jury,* fully resolves the issue of voluntariness is not a matter of concern here." (Footnote 19) (Emphasis added)

We believe that the requirement of this Court in *Jackson v. Denno* is clear: the hearing on involuntariness must not be in front of the jury that decides the issue of guilt or innocence. The purpose of that requirement is to prevent grave injustices inherent in involuntary confessions. It is to prevent the jury from hearing an improper confession; and indeed, it is to prevent the jury from hearing that the accused has made a confession at all, until the trial judge decides the confession can properly come before the jury. That purpose has its roots in the nature of a confession. A confession is dramatic and highly emotional to a lay jury. In a confession the jury hears the words of the accused saying things which incriminate him. That dramatic impact was even more emotional in Atchley's case, because the jury heard the confession in a recording of his voice, and not just in a writing or in the testimony of another witness.

Holding the hearing on the confession in front of the jury has other dangers. It forces the accused to make choices before the jury which are really no choices at all: Should he present evidence that the confession is involuntary, and thereby risk reinforcing the language of the confession in the minds of the jury? Or should he attempt to minimize the confession by ignoring it, and thereby risk leaving the jury with the impression that it is undenied? And once the confession is before the jury, should he attack or embrace the substance of what the confession said? Should he challenge that substance and make himself appear to be a liar? Or should he agree to the substance and make himself appear to have "confessed"? These unjust choices are forced upon the accused *even though the confession is*

*ultimately ruled involuntary*. Once the jury has heard the confession, that bell has rung; and later ruling it involuntary cannot "unring" it. The State attempts to further these unjust choices in this case. The State argues[76] that Atchley's counsel embraced the confession in his closing argument.[77] But counsel's argument was merely his Hobson's choice of attempting to minimize the significance of the involuntary confession after it was in evidence. Counsel's choice was forced upon him by the jury hearing the involuntary confession and the circumstances surrounding it. His argument contrasts markedly with the very lengthy and detailed objections which he made to the confession.[78]

*Jackson v. Denno* correctly prevents such injustice by requiring that hearings on involuntariness not be before the jury.

The District Court interpreted *Pinto v. Pierce* as permitting the hearing to be in front of the jury.[79] But if that is the meaning of this Court's statement on page 32 of *Pinto*, we believe it should be clarified. The question of whether the *procedure* for determining involuntariness is constitutional should not depend upon whether the *substantive result* of that procedure is a finding of voluntariness or a finding of involuntariness. At the time of the hearing, no one knows whether the finding will be "voluntary" or "involuntary." The correctness of the procedure for making that finding must stand on its own feet. And for the reasons stated, that procedure should require that the jury

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[76]Petitioner's Brief, 10, 23.

[77]R.T. 2587.

[78]A. 86-160. The State's argument also contrasts markedly with present California procedure. Section 402(b) of the California Evidence Code, which became effective on January 1, 1967, requires the trial judge to determine the admissibility of a confession out of the presence of the jury if any party so requests.

[79]A. 77-8.

not hear the matter. Any inference to the contrary in *Pinto* should be disapproved. But even further, we do not think that the language in *Pinto* should apply to Atchley's case. (1) In *Pinto,* the accused *consented* to having the hearing before the jury. Atchley's counsel objected to the confession, and the hearing was held initially in chambers. (2) In *Pinto,* the hearing was otherwise adequate and no unfair consequences resulted to the accused. As we discuss in this brief, Atchley's hearing was inadequate for many reasons, with highly unfair consequences. The hearing in front of the jury must also be considered in light of the fact that the judge never ruled on voluntariness; he just submitted everything to the jury.

### *The Hearing Was Constitutionally Inadequate Because Relevant Evidence Was Excluded*

Atchley's hearing was constitutionally inadequate for another separate reason. At the hearing, the trial judge excluded evidence on involuntariness which should have been admitted:

(1) No evidence was allowed that Atchley had requested and been denied an attorney several times before his confession. The trial court told the jury to disregard that offered evidence.[80] This Court has held the absence of an attorney to be highly relevant to voluntariness in the cases discussed on page 14 of this brief. The California Supreme Court agreed that this exclusion was error.[81]

(2) No evidence was allowed to show that: Atchley believed his talk with Travers was confidential; Atchley didn't know a recording was being made; and Atchley was deceived by his friend.[82] Yet this Court has said that these are important factors in determining whether a confession

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[80] A. 154-5.

[81] A. 58.

[82] A. 134-5, 149, 156-7, 90-1.

is voluntary; *Spano v. New York; Leyra v. Denno; Massiah v. United States; Lisenba v. California.* The fact of the secret recording is particularly important in view of the Court's decision in *Katz v. United States.*

(3) The trial court also prevented testimony of the conversation between Travers and the sheriff who led Travers to deceive Atchley.[83] And Atchley was not permitted to examine the sheriff before Travers testified.[84] These inquiries related directly to the secret recording, the deceit practiced upon Atchley, Atchley's lack of knowledge of that deceit, and the inducement of insurance proceeds for his cooperation.

In addition, certain important inquiries should have been made by the trial court:

(4) There is no record that the police advised Atchley of his constitutional rights. In *Davis v. North Carolina,* this Court said that this was significant in considering the voluntariness of statements later made; accord, *Greenwald v. Wisconsin.* As the Court said in *Haynes v. Washington* (516-517):

> "Beyond even the compelling nature of our precedents, however, there is still another reason for refusing to consider the present inquiry foreclosed by the verdict of the jury to which the issue of voluntariness of the confession was submitted. The jury was instructed, in effect, not to consider as relevant on the issue of voluntariness of the confession the fact that a defendant is not reminded that he is under arrest, that he is not cautioned that he may remain silent, that he is not warned that his answers may be used against him, or that he is not advised that he is entitled to counsel. Whatever independent consequences these factors may otherwise have, *they are unquestionably attendant circumstances which*

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[83] A. 156-7.

[84] A. 135-9.

*the accused is entitled to have appropriately considered in determining voluntariness and admissibility of his confession.*" (Emphasis added)

(5) Evidence regarding Atchley's lack of intelligence and education was objected to by the State.[85] However, such evidence was held material to involuntariness in *Culombe v. Connecticut, Reck v. Pate, Davis v. North Carolina, Spano v. New York,* and *Greenwald v. Wisconsin.*

In summary, the hearing on Atchley's confession was constitutionally inadequate for three separate reasons. First, the trial judge made no decision on the voluntariness or involuntariness of the confession, as required by *Jackson v. Denno* and other cases. Second, the hearing was conducted partially in front of the jury, a practice condemned by *Jackson v. Denno.* Finally, a great quantity of evidence was excluded which this Court has held is relevant to the issue of involuntariness. Any one of these reasons alone would compel the conclusion that Atchley's hearing was constitutionally inadequate. The presence of all three is overwhelming.

At the very least, the judgments of the lower courts should be affirmed that Atchley is entitled to a hearing on the issue of involuntariness.

## The State's Arguments Regarding the Confession and the Hearing Demonstrate No Ground for Reversal of the District and Circuit Courts

We will now respond to arguments made by the State regarding the confession and the trial court hearing. We will show that the State demonstrates no ground for reversal of the District and Circuit Courts.

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[85] A. 146-8.

### *The First Conversation Between Travers and Atchley Does Not Save the Involuntary Confession*

The State's main argument concerns a prior conversation between Travers and Atchley. The State argues that it made the confession voluntary as a matter of law.[86] There are several answers, both factual and legal.

First, Travers did not directly testify to the substance of his first conversation with Atchley. The State did not examine Travers on what Atchley said in that conversation. While Travers made some references to it in voir dire and cross-examination, there was no direct testimony of what Atchley told Travers. This is demonstrated by the fact that if all references to the involuntary confession were stricken from the record, there would be no evidence of the first conversation between Travers and Atchley.

Second, there is testimony that the first conversation differed in some degree from the recorded confession.[87] In the recorded confession Travers aggressively pursued the questioning of Atchley. All Travers really needed for his insurance company were the names and ages of the children.[88] But in the recorded confession, he went far beyond that requirement, and used aggressive examination techniques in questioning Atchley about the death.[89] With these material differences, the first conversation cannot support the confession. But even assuming, solely for the sake of argument, that Travers could or did testify to a corroborating conversation, the State's argument is wrong legally:

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[86]Petitioner's Brief, 25-7.

[87]A. 158, 172.

[88]A. 148, 153.

[89]A. 98, 99, 152, 158, 172-3.

The State assumes that the only principle barring involuntary confessions is inaccuracy. It argues that if it can establish accuracy by another conversation, the involuntary confession is then proper. Both the assumption and the argument are wrong. They would lead to the conclusion that as long as a confession is accurate, it can be *tortured* from an accused. But this Court has frequently stated that the principles barring involuntary confessions are not just ones of accuracy. The principles are fundamental human rights and the necessity for police obeying the law.[90] In *Rogers v. Richmond,* 365 U.S. 534, 5 L.Ed.2d 760, 81 S.Ct. 735 (1961), this Court held that without regard to the truth or falsity of a confession, it is a violation of due process to use an involuntary confession; accord, *Jackson v. Denno,* at 376, 384-6.

The State's argument has also been answered by many decisions of this Court holding that if an involuntary confession is used there is a violation of due process which requires reversal, even if there were other confessions and other evidence sufficient to prove guilt.[91]

*Trial Court Evidentiary Rules Cannot Exclude Constitutional Requirements*

The State's other arguments regarding the confession and the trial court hearing[92] are based on rules of evidence. That is, the State argues that the rulings of the trial court were correct under state evidentiary law. But this argument assumes that rules of evidence control requirements of constitutionality. The opposite is true. Evidentiary rules must bow to the requirements of the Constitution; as this Court said in *Fay v. Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963):

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[90]See authorities, pages 11-12 of this brief.

[91]Cited on page 10 of this brief.

[92]Petitioner's Brief, 17-24.

> "State procedural rules plainly must yield to this overriding federal policy." (426-7)

The Constitution requires that an adequate hearing be held on the issue of voluntariness. If that hearing is not adequate, the inadequacy cannot be explained away by evidentiary rulings.

Further, the State concedes that certain evidence rulings were indeed erroneous.[93] The State can only argue that those errors were not prejudicial.[94] But that argument is contrary to the decisions of this Court. In *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, (1967), this Court said:

> "... there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error..." (23)

The Court's reference in that quotation specifically includes a "coerced confession" (footnote 8).

Finally, the State questions whether the District Court was correct in holding that the trial court had followed an erroneous standard of law.[95] The State's argument is apparently that there has been no new law on confessions. But there have been significant developments in constitutional standards for confessions. To name a few:

(1) *Jackson v. Denno* was decided in 1964. That case made three significant changes. (a) It held that the trial judge must rule on the voluntariness of the confession. (b) It held that the hearing on voluntariness must not be before the jury. (c) It further defined the standards of adequacy for voluntariness hearings. *Jackson v. Denno* was then held to be retroactive by the Court in *Johnson v. New Jersey* and *Linkletter v. Walker*.

(2) The Court decided *Escobedo* and *Miranda*. This Court later held those decisions to be retroactive on the

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[93]Petitioner's Brief, 19.

[94]Petitioner's Brief, 19, 27.

[95]Petitioner's Brief, 24.

issue of voluntariness; *Darwin v. Connecticut*, *Johnson v. New Jersey*, and *Davis v. North Carolina*.

The retroactive application of the Court's standards also answers the State's argument regarding evidentiary rules. Evidentiary rules must bow to the requirements of the Constitution.

## The District Court Correctly Determined That the Presumption of 28 U.S.C. § 2254(d) Had Been Rebutted

One of the State's principal arguments is that the District Court "refused" to apply the presumption of 28 U.S.C. § 2254(d).[96] The District Court did not refuse to apply that section. It addressed itself directly to that code section and concluded:

> "... the Court is of the opinion that [Atchley] has successfully rebutted the presumption contained in 28 U.S.C. § 2254(d)..."[97]

The State can only argue that the District Court and Court of Appeals somehow misapplied the section; that is, that the presumption applied and was not overcome. However, the courts' application of the section was consistent with the legislative intent, the language of the section, and the facts. In responding to the State's argument we will: (1) define the legislative intent of the section; (2) show that Atchley's involuntary confession was within the exceptions to the presumption; and (3) show that in any event the presumption was successfully rebutted.

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[96]Petitioner's Brief, 2, 13.

[97]A. 78.

*The Legislative History of Section 2254(d) Demonstrates That Its Purpose Is To Extend, Not Limit, Constitutional Protections to Accuseds*

Subsection (d) was added to Section 2254 by Public Law 89-711, § 2, 80 Stat. 1105. That subsection was passed to codify this Court's decision in *Townsend v. Sain*, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963). In *Townsend v. Sain* the Court directed the District Courts to inquire into the constitutionality of certain state court convictions. This Court's directions in *Townsend v. Sain extended* constitutional protections and were approved and codified by Congress in subsection (d).

The intent of Congress to extend constitutional protections in subjection (d) also appears in the language of the committee report; Senate Report No. 1797, Eighty-Ninth Congress, Second Session, pages 1 through 3. The report quoted with approval a statement that its intended purpose was to have the state courts strengthen their constitutional safeguards:

> "It is the opinion of your committee that the proposed legislation, if enacted, will be *a strong inducement to the States that have not already done so to provide adequate post-conviction remedies and procedures and to make and keep available records of evidentiary matter* in criminal and post-conviction proceedings, and to the State courts in criminal proceedings *to safeguard the constitutional rights of defendants.*" (Page 3) (Emphasis added)

The State argues that subsection (d) was to establish a "qualified doctrine of res judicata in federal habeas corpus proceedings brought by state prisoners."[98] But the State has misquoted the legislative history. The language of the committee report of "a qualified application of the doctrine of res judicata" appears in the portion of the report dealing

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[98]Petitioner's Brief, 14.

with amendment of Section 2244, not amendment of Section 2254. Section 2244 concerns prior *federal* court convictions. It therefore appears that the "qualified doctrine of res judicata" was intended by Congress to apply to prior *federal* court convictions, not prior *state* court convictions.[99]

The intent of Congress was further expressed by its action on the 1968 legislation quoted by the State.[100] The provisions of that bill were *not* passed by Congress. Congress deleted the State's language from its legislation, and that deletion is an expression of its satisfaction with existing standards.

It is therefore apparent that passage of subsection (d) was not intended by Congress to be a *limitation* on the constitutional protections extended by this Court. Rather, Congress codified those *extensions* of protection and expressed its concern over the adequacy of trial court[101] conviction procedures. With that legislative intent in mind, we now turn to the application of the presumption in Atchley's case.

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[99]The State's quoted language is contained in a letter attached to the committee report (page 4). However, it is the committee *report* that is authoritative; Stern and Gressman, *Supreme Court Practice*, 4th Edition, page 475.

[100]Petitioner's Brief, 14, footnote 7.

[101]In an attempt to strengthen its argument regarding subsection (d), the State claims that § 2254(d) applies to *appellate* court decisions as well as to trial court determinatons; Petitioner's Brief, 17, 35. We disagree with that claim: (1) The language of subsection (d) addressing itself to "a hearing on the merits of a factual issue" indicates that only trial court decisions are entitled to the presumption; and (2) this Court expressed the same conclusion in *Townsend v. Sain* (pages 316 and 296-297) and *Fay v. Noia* (pages 426-427 and 422). But that disagreement is not important here; the exceptions to Section 2254(d) govern this case, and even if the presumption were applied, it has been rebutted.

*The Presumption Did Not Apply to Atchley Because His Involuntary Confession Was Within the Exceptions to the Presumption*

Section 2254(d) contains express exceptions to the application of the presumption. That section states that the presumption exists "...unless the applicant shall establish or it shall otherwise appear..." that one of eight exceptions exists. This same "unless" language is repeated in the last paragraph of that subsection (d). The Court should note that those eight exceptions are taken from the standards of this Court in *Townsend v. Sain.* The following exceptions enumerated in subsection (d) apply to Atchley's confession and hearing:

> "(1) ... the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) ... the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) ... the material facts were not adequately developed at the State court hearing;
>
> (6) ... the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> (7) ... the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) ... unless... the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record..."

The facts enumerated above in this brief demonstrate that the trial court proceedings were within one or all of those enumerated exceptions. We can state our conclusion regarding those exceptions and Atchley's trial court hearing no better than to quote the District Court:

> "In light of the above discussion, it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was volun-

> tary or involuntary. The hearing on voluntariness was not 'fully adequate to insure a reliable and clear-cut judicial determination of the voluntariness of the confession'. . ."[102]

*The Presumption Was Rebutted*

Even if Atchley's involuntary confession were not within one of the exceptions to the subsection—as we believe that it is—the result was still correct.

The District Court properly conducted the habeas corpus proceeding. It exercised the jurisdiction given to it by Section 2241. It reviewed the trial court transcript. And it performed its duty under Section 2243 to hear and determine the facts and dispose of the matter as law and justice required.

The most that the presumption of § 2254(d) did was to place upon Atchley some burden of rebuttal. Atchley met that burden. The District Court specifically found that any presumption had been "successfully rebutted."[103] That finding is supported by the facts discussed on pages 18 through 30 of this brief.[104] The District Court properly held that Atchley had successfully rebuted any presumption under Section 2254(d).

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[102]A. 76.

[103]A. 78.

[104]It is apparent from the language of the *second* paragraph of subsection (d) that the presumption defined there applies only at the "evidentiary hearing" in the "Federal court." It did not apply to the District Court determination here.

## Federal Courts Must Continue To Examine the Federal Constitutionality of Trial Court Convictions

### *The State's Proposed Rule Would Eliminate Federal Court Examination of Constitutionality of Trial Court Convictions*

The State's main objective[105] is to have this Court destroy the present federal system for examining the constitutionality of trial court convictions. The State wants a new rule.[106] The State's rule would restrict, to the point of eliminating, federal court examination of the constitutionality of state court convictions.[107] Federal court habeas corpus power would become ineffective.

The State's proposed rule must be read with care. But even a careful reading of the words does not adequately reveal the enormity of what the State is really asking. The State's new rule:

(1) Requires this Court to overrule[108]—not just modify, but overrule—its landmark decisions defining and protecting human rights;

(2) Requires this Court to reverse the grants of power and duty given by the Court and by Congress to the federal district courts;[109] and

(3) Requires this Court to release the administration of the *federal* Constitution to the *state* courts.

The State candidly admits that its objective is the reversal of this Court's decisions on the rights of accuseds.[110] But

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[105]Petitioner's Brief, 27 et seq.

[106]Petitioner's Brief, 28.

[107]The State did not present this argument in its petition for certiorari. Nevertheless, because of the importance of the State's objective, we are compelled to reply.

[108]Petitioner's Brief, 30.

[109]Petitioner's Brief, 35.

[110]Petitioner's Brief, 30.

the State fails to point out the consequences. This Court cannot accept the State's position without:

(1) Turning its back on the human rights which it has so carefully defined and protected;

(2) Turning its back on the powers and duties granted to the federal courts by Congress in Chapter 153 of Title 28 of the United States Code and by this Court in numerous decisions; and

(3) Abdicating the duties of the federal courts to fifty separate, geographically diverse, and procedurally diverse state court systems.

The rights put in jeopardy by the State's proposed rule are basic human freedoms. The State's argument jeopardizes not just isolated steps of procedure; it affects the administration of justice in every court in the nation. It jeopardizes not just some obscure statute or regulation; it affects the basic document of human liberty, the Bill of Rights. It jeopardizes not just trivial privileges; it affects the very touchstone of justice: the right of an accused to a fair trial for his life and liberty.

The State's rule must be rejected. Federal courts *must* examine the federal constitutionality of trial court convictions.

We will answer the State's argument as follows: (1) There are basic principles why the federal courts must examine constitutionality, and why habeas corpus is vital to that function. (2) The State's proposed rule is contrary to the intent of Congress. And (3) even if the State's rule were adopted, it would not result in reversal of this case.[111]

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[111]We also believe that the State's proposed rule is too vague for proper administration. But because of the reasons against the principle of the proposed rule, we will not discuss vagueness.

*There Are Basic Principles Why Federal Courts Must Examine Constitutionality of Trial Court Convictions, and Why Habeas Corpus Is Vital to That Function*

The real question posed by the State's proposed rule is this: Who will define the application of the federal Constitution to criminal trials, the state courts or the federal courts? The State's rule would virtually eliminate the authority of federal courts over the constitutionality of state convictions, and would restrict the power of federal courts to issue habeas corpus. But this Court and Congress have both concluded that the federal courts must make the final constitutional decisions. There are sound principles why the federal courts must examine constitutionality, and why habeas corpus is authorized for the enforcement of constitutional rights. We can do no better to express those principles than to refer to this Court's prior decisions. In doing so, we refer to them not just because they are precedent; but rather, because of the principles which that precedent defines.

Simply stated, the principles are these: The Constitution gives to every citizen of the United States certain rights. Those rights extend to him when tried in a state court. If a state trial denies him those rights, the Constitution has been violated. The Constitution is a federal document. The federal courts are the ones to see that the rights granted by the Constitution are enforced, and that they are enforced uniformly in state trials. The writ of habeas corpus is the procedure for that federal court enforcement.

In *Fay v. Noia,* the Court expressed the importance to human liberty of federal supervision of state convictions, and it discussed in detail the vital role of habeas corpus. The Court summarized its holdings at 426-7:

> " . . . we have consistently held that *federal court jurisdiction* is conferred by the allegation of an unconstitutional restraint and *is not defeated* by anything that may occur in the *state court proceedings. State procedural rules* plainly must yield to this overriding *federal* policy." (Emphasis added) Ac-

cord, *Reck v. Pate*, 435; *Haynes v. Washington*, 515.

We cite this Court's learned opinion in *Fay v. Noia* as a living statement of the principles which the State seeks to reverse in this case. Although we would like to quote that opinion in its entirety, that is of course impractical. Instead, we respectfully direct the attention of the Court to the principles stated in that opinion, and we quote a few brief passages:

> "*If the States withhold effective remedy, the federal courts have the power and the duty to provide it.* Habeas Corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy" (441). (Emphasis added)
>
> "It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure" (440).
>
> "*Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights* becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide" (438). (Emphasis added)

In *Townsend v. Sain* this Court directed the district courts to exercise their habeas corpus power to examine the constitutionality of state court convictions. The Court said (311-312):

> "The rule could not be otherwise. The whole history of the writ—its unique development—*refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review.* The function of habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of

review of criminal judgments, the very gravest allegations. *State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the federal Constitution* . . .

"The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on *federal habeas corpus is plenary.* Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, *the federal court to which the application is made has the power to receive evidence and try the facts anew.*" (Emphasis added)

This Court has further held that many of its constitutional decisions must be applied *retroactively* to state court convictions. That retroactivity is a recognition of (1) the importance of the rights being protected, (2) the necessity for the federal courts to supervise those rights, and (3) the necessity for the state courts to comply with the requirements of the federal Constitution.

Indeed, all of the decisions of this Court reversing state court convictions for constitutional reasons are per se recognitions that the federal courts must be the final arbiters of the Constitution.

A consistent and effective application of the Constitution can only be achieved by that principle. Constitutional rights could not be effectively protected if each state were free to grant or withhold them; if each state were able to determine for itself what they meant; and if each state were then free to apply them to the facts—all without concern for examination by the federal courts.

Nor is this federal system an unwarranted intrusion upon the states; *Fay v. Noia,* 440. Both Congress and this Court require that state remedies be effectively exercised before federal habeas corpus power can be used. District court judges are selected from the states in which they reside. And district courts hear their cases in the separate states and

are conversant with the laws, procedures and policies of those states.

We believe that the holdings and the opinions of this Court have already rejected the State's proposed rule. The principles involved were fully considered by the Court in *Fay v. Noia* and *Townsend v. Sain*. Those principles are as valid today as they were in 1963. We can say no more than this Court has already said why the State's proposed rule must be rejected as repugnant to the Constitution. We will now respond to some of the specific arguments of the State in support of its proposed rule.

The State refers to recent decisions of this Court improvings state trial procedure.[112] From these improvements, the State argues that its procedures are now adequate. And it argues that the states have more incentive to do a good job of administering constitutional law. In response, we first point out that the important decisions of this Court on constitutional rights in state trials were *opposed* by the states. The states did not voluntarily embrace those rights, but adopted them only when required by this Court. Would accuseds have those rights today if this Court had not told the states they must provide them? And even if *some* states applied those rights voluntarily, would the existence of such rights in one state, and their denial in another, be compatible with the Constitution?[113] We believe that these questions answer themselves. If there were no habeas corpus inquiry into trial court convictions, the trial courts would lose—not gain—their incentives for constitutional procedures in the administration of justice and protection of human liberty. The improvements cited by the State would not have occurred if the State's proposed rule had been in effect.

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[112]Petitioner's Brief, 31.

[113]Even if the procedures and rights in California courts might meet constitutional standards, the rule which the State desires must necessarily apply to all states.

The State argues that there are procedural burdens on the federal courts in enforcing constitutional rights. It also impliedly argues that there are burdens on the state courts in granting those rights to accuseds. But any problems in the administration of constitutional rights should not eliminate the existence of those rights. The courts' administration of their calendars is at most a practical problem, capable of practical solution. Whenever this Court has defined an important constitutional right, both the state and federal courts have adopted the necessary administrative procedures. And such procedures as that used by this Court in *Jackson v. Denno*, referring evidentiary hearings to the state courts, help reduce whatever burden there might be on federal calendars.

The State makes a further argument which is frightening. It argues that consititutional rights at trial should give way to condemnation and then rehabilitation.[114] Carried to its logical conclusion, the State's argument would say there is no reason for constitutional rights; rather, lock up all accuseds and then rehabilitate them. That is hardly consistent with the Constitution. Rehabilitation is certainly a vital objective of criminal justice. But that worthwhile objective does not eliminate constitutional rights at trial. A person has the right to be fairly tried before he is condemned and rehabilitated.

We also note the overemphasis which the State's proposed rule would give to state *appellate* opinions. The State's rule would make "the face of a state appellate court opinion"[115] of controlling significance. But the protection of constitutional rights is not just what a state appeal court may say in its opinion. As this Court said in *Fay v. Noia:*

> "[There] is no less a denial of due process because the State Supreme Court believed that the trial was actually a fair one." (427)

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[114]Petitioner's Brief, 32.

[115]Petitioner's Brief, 28. See also footnote 101 in this brief.

And in *Townsend v. Sain:*

> "The whole history . . . refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." (311)

Constitutional rights have their real significance in the *trial* court, where the jury determines guilt or innocence. Enforcement of those rights requires an examination of what occurred at trial. The state courts can not hide constitutional inadequacies behind a literary appellate opinion.

### *The State's Proposed Rule Is Contrary To the Intent of Congress*

The State's proposed rule, restricting federal courts in examining the constitutionality of trial court convictions, is contrary to the intent of Congress. That congressional intent is expressed in numerous statutes; for example:

Chapter 153 of Title 28 (§§ 2241 and following) are the statutes defining the power of federal courts to grant habeas corpus. That chapter is a *grant* of power to the federal courts, indicating Congress's intent that federal courts should examine trial court proceedings. Section 2241 defines that power, its wide scope, and its purpose. In Section 2243 Congress gave federal courts broad discretion to "summarily hear and determine the facts, and dispose of the matter as law and justice require." In Sections 2245 through 2248 Congress specified evidence which federal courts could consider in such proceedings. And in Section 2251 Congress gave federal courts power to stay state court proceedings. The enforcement of rights provided in Chapter 153 expresses Congress's intent that federal courts have fact-finding supervision over the constitutionality of state court trials.

Subsection (d) of Section 2254, on which the State relies, is an expression of that same congressional intent. In that subsection Congress enumerated eight circumstances in which presumptions for the state courts would not apply. By enumerating those circumstances, Congress specifically

gave federal courts power to right those wrongs without any presumption for the benefit of the state. Representing, as it does, a codification of this Court's decision in *Townsend v. Sain*, subsection (d) is also an expression of Congress's approval of the decisions of this Court on federal court examination of state criminal proceedings.

The State's proposed rule is also contrary to the intent of Congress expressed in the Civil Rights Act; 42 U.S.C. § 1981 et seq.; 28 U.S.C. § 1343. In those sections, Congress granted federal courts jurisdiction over complaints of unconstitutional conduct in state proceedings.

It is therefore apparent that Congress intends the federal courts to supervise the constitutionality of state court convictions. The State's proposed rule is contrary to that intent. Indeed, with the specific statutes which Congress has passed defining the role of the federal courts in reviewing state convictions, it is questionable whether the Court *could* adopt the State's proposed rule.

### *Even If the State's Proposed Rule Were Adopted, It Would Not Result in Reversal of This Case*

Even under the State's proposed rule, federal courts would still review state convictions if there were no "adequate corrective process" or if the prisoner's contentions were not "fairly considered."[116] The errors in the hearing on Atchley's involuntary confession are within those exceptions. As stated by the District Court:

> ". . . it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary. The hearing on voluntariness was not 'fully adequate to insure a reliable and clear-cut judicial determination of the voluntariness of the confession' as required . . ."[117]

And:

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[116]Petitioner's Brief, 28.

[117]A. 76.

". . . the procedure used and the standards followed by the trial court did not satisfy the requirements . . ."[118]

We will not here repeat the reasons why the hearing on Atchley's involuntary confession was not an adequate corrective process and was not fairly considered. Those reasons have been discussed on pages 18 through 30 of this brief. For all of the reasons there stated, the District Court would still have the power to upset Atchley's conviction, even under the State's proposed rule.

There is a further reason why the District Court properly upset Atchley's conviction, even under the proposed rule. The State's rule would specifically provide that the state court's consideration must be "in the light of applicable constitutional law."[119] The District Court specifically found that the trial court "followed an erroneous standard of law in determining that the confession was voluntary."[120]

In that regard, the State attempts to support its position by arguing that this Court determined the fairness of Atchley's conviction when his petition for certiorari from his conviction was heard.[121] But the argument is incorrect. The dismissal of certiorari as improvidently granted does not constitute a decision on the merits; *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 1 L. Ed. 2d 493, 77 S.Ct. 443 (1957) (concurring and dissenting opinion of Justice Harlan, and the dissenting opinion of Justice Frankfurter); see also, Leiman, "The Rule of Four," 57 Colorado Law Review 974 (1957), 105 U. Pa. Law Review, 1084 (1957). And in at least three involuntary confession cases, this Court upset confessions on certiorari coming through

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[118] A. 78.

[119] Petitioner's Brief, 28.

[120] A. 78, footnote 8.

[121] Petitioner's Brief, 3, 12.

the federal courts after having previously denied certiorari from the state convictions; *Leyra v. Denno, Jackson v. Denno,* and *Davis v. North Carolina.* The State's argument is also answered by the fact that subsequent to Atchley's petition from his state conviction, this Court held certain constitutional defects, including that of *Jackson v. Denno,* to be retroactive.

**If a Further Hearing on the Involuntary Confession Is Necessary, the District Court Correctly Ordered the State To Provide That Hearing Under This Court's Procedures in Jackson v. Denno**

As we have stated, we believe that the Court should hold that Atchley's confession was involuntary as a matter of law, and that Atchley should receive a new trial. If this Court nevertheless determines that a further hearing on the involuntariness of Atchley's confession is necessary, the procedure defined by the Court in *Jackson v. Denno* is correct.

The District Court directed the State to give Atchley a new hearing on the issue of voluntariness.[122] The State objects to this procedure.[123] The State agrees that the evidentiary hearing should be in the state court, but it contends that Atchley should be the petitioner.

Under such a procedure, Atchley would again be the applicant, pleading to the state court for relief. However, since this Court will at that point have already determined that the hearing on Atchley's confession was improper, the State and not Atchley should be the applicant to correct the impropriety. It was the State that initiated the process of prosecution. Since that process was constitutionally

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[122] A. 78.

[123] Petitioner's Brief, 38-9.

inadequate, it is the State's obligation to provide the means for correcting it.

The State's authorities[124] do not answer the point. They pertain to the *original* habeas corpus jurisdiction of the California courts. They do not limit the power of this Court to require corrective remedies when constitutional rights have been violated.

The State contends that there is no proceeding for the State to initiate the hearing.[125] But the answer is apparent: Reversing Atchley's conviction necessarily refers the case back to the state court to correct the defect in the trial proceedings; therefore, the hearing could be in the original action.

The State also argues that the burden of proof in the state hearing will be on Atchley. We disagree. As conceded by the State,[126] it has the burden of proof that the confession was voluntary. That burden does not shift to Atchley under § 2254(d), because Atchley's confession is within one of the exceptions to the presumption in that section. The burden of proof remains with the State.

This Court has granted the remedy of a state evidentiary hearing many times. It did so in *Jackson v. Denno* (391-6). It did the same in *Boles v. Stevenson* (45-46). And it did so in *Sigler v. Parker.*

That procedure has also received the implied approval of Congress. *Jackson v. Denno* was decided in 1964. Subsection (d), whose subject is federal court examination of state convictions, was added to § 2254 two years later, in 1966. In codifying this Court's decisions into subsection (d) after *Jackson v. Denno,* Congress impliedly agreed to the procedures provided by the Court in that case.

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[124]Petitioner's Brief, 39.

[125]Petitioner's Brief, 39.

[126]Petitioner's Brief, 23. A. 93.

We again note that referral to the state courts also aids the dockets of the federal courts, a subject on which the State comments frequently in its brief.

## CONCLUSION

Atchley's conviction cannot stand. He is an illiterate man, with low natural intelligence and permanent brain damage. A confession was obtained from him involuntarily. He was denied an attorney several times, was never advised of his rights, and suffered from shock and lack of sleep. He was finally deceived by a friend who was the police's agent. The deceit offered Atchley a reward, insurance money. By that deceit and reward, his confession was secretly recorded.

That confession was vital to Atchley's conviction.

Because of the circumstances, particularly the repeated denial of an attorney, Atchley's confession was involuntary as a matter of law.

Further, the hearing on the confession was constitutionally inadequate. The trial judge did not rule on the confession. The hearing was conducted in the presence of the jury. And relevant evidence was excluded.

The State's arguments demonstrate no basis for reversal of the lower courts. Section 2254(d) was excepted and rebutted. And this Court should reject the State's attempt to destroy federal court examination of the constitutionality of trial court convictions.

Atchley asks the judgment of this Court as follows:

(1) The judgments of the District Court and Court of Appeals should be modified to hold that his confession was involuntary as a matter of law, and he should have a new trial; as so modified, those judgments should be affirmed.

(2) At the very least, the judgments of the courts below granting Atchley a new hearing on the involuntariness of his confession should be affirmed in their present form.

DATED: July 8, 1970, San Francisco, California.

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## APPENDIX TO RESPONDENT'S BRIEF

§ 2254

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such fac-

tual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1970

No. 44

R. K. PROCUNIER, Director of the California Department of Corrections, *Petitioner,*

vs.

VERON ATCHLEY, *Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## CLOSING BRIEF FOR THE PETITIONER

### PETITIONER'S REPLY ARGUMENT

### I

**THE PROCEDURE FOLLOWED BY THE TRIAL COURT TO DETERMINE THE VOLUNTARINESS OF ATCHLEY'S STATEMENT COMPLIED WITH THE REQUIREMENTS OF JACKSON V. DENNO.**

At trial Atchley had a constitutional right at some stage in the proceeding to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Jackson v. Denno,* 378 U.S. 368 (1964). He now argues that there was no finding at the trial level

that his statement to Travers was voluntary. He relies on the record's failure to show that the trial judge ever specifically stated that the confession was "voluntary" and the lack of specific instructions to the jury from which they could determine whether the confession was voluntary.

Atchley was entitled to no more than one determination on the issue of the voluntariness of his statement. We do not contend that this determination was made by the trial jury.[1] We submit that the trial judge, by his act of allowing this statement to go to the jury, made a clear finding that it was voluntary.

California has long followed the "Massachusetts" or "Humane" procedure for the admission of confessions. See *Jackson v. Denno,* 378 U.S. 368, 418 (1964), App. A to Justice Black's opinion. In California the trial court must first determine from the attendant circumstances whether the confession was free and voluntary. *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944). This places upon the prosecution the burden of laying a foundation for the introduction of a confession by preliminary proof which satisfies the trial court that the confession was freely and voluntarily made. Before a confession may be received into evidence the defendant, upon request, must be accorded the opportunity to introduce evidence to overcome the prima facie showing of the prosecution. It

[1]If the trial court erred in failing to give specific instructions to the jury on the issue of the voluntariness of this statement such error would be one of state law only, to be decided by the state courts and its impact to be weighed under the California harmless error rule. See Calif. Const. Art. VI, § 13; *People v. Watson,* 46 Cal.2d 818, 299 P.2d 243 (1956).

is then the function of the trial court in the first instance to resolve any conflict in the evidence going to voluntariness. *People v. Gonzales, supra.* If the trial court concludes that the confession was not free and voluntary, it "is in duty bound to withhold it from the jury's consideration". *People v. Gonzales, supra.* However, if there is evidence that the confession was free and voluntary, it is within the discretion of the trial court to submit to the jury for its determination, albeit redundant, the question of whether under all the circumstances the confession was freely and voluntarily made. *People v. Gonzales, supra.*

Atchley received his constitutionally required finding on the issue of voluntariness when the trial judge did not remove the statement from evidence at the close of the case. There was no conflict in the evidence concerning the circumstances surrounding Atchley's statement to Travers. Hence, the question of that statement's voluntariness was clearly decided when the trial judge, who was aware that he was required to withhold it from the jury if it was involuntary (App. 127), permitted the case to go to the jury with the confession in the record.[2]

Atchley argues that the trial court did not follow these procedures because it did not instruct the jury specifically that the question of the voluntariness of

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[2]"In jurisdictions . . . following the Massachusetts procedure, . . . the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary." *Jackson v. Denno, supra,* 378 U.S. at 378-379.

his confession was for their ultimate decision. A defendant is entitled to have the jury instructed appropriately on this subject only if he so requests. Once the trial court has itself found the confession voluntary, the rule of *Jackson v. Denno* is satisfied and failure to instruct the jury, even if requested, is merely a matter of state law and not a federal question. Whether the jury has been properly instructed on the voluntariness issue is totally irrelevant to the question of whether there has been compliance with *Jackson v. Denno.*

Atchley further complains that most of the evidence on voluntariness was presented to the trial court in front of the jury. While it is undoubtedly better procedure to hear the evidence in the absence of the jury since the trial court runs the risk of having to declare a mistrial if the statement is found to be involuntary, there is no constitutional requirement that such evidence not be taken in their presence. See *Pinto v. Pierce,* 389 U.S. 31 (1967); compare, *United States v. Feinberg,* 383 F.2d 60, 69-70 (2nd Cir. 1967), *cert. denied,* 389 U.S. 1044 (1968).

Eleven years after his trial Atchley can only point to one factor which he claims shows his confession was involuntary that was not considered by the trial court. Neither the trial court, nor the California Supreme Court, was faced with the contention that because he had not been advised of his constitutional right to silence his confession was involuntary. However, this Court has held that the denial of a request for counsel or the failure to advise the defendant of his right to silence, while factors tending to show

involuntariness, will not by themselves support a reversal of cases tried prior to *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966). *Johnson v. New Jersey*, 384 U.S. 719, 730-32 (1966).

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## II

**THE CALIFORNIA SUPREME COURT'S HOLDING ON DIRECT REVIEW OF ATCHLEY'S CONVICTION THAT HIS CONFESSION WAS VOLUNTARY IS ENTITLED TO THE PRESUMPTIVE VALIDITY CONFERRED BY TITLE 28, UNITED STATES CODE, SECTION 2254(d).**

Atchley characterizes this case as one where no decision on the issue of voluntariness was made by either the trial court or the trial jury. We submit that this is an incorrect reading of the record because a finding of voluntariness was made by the trial judge (Arg. I, *supra*). However, even if no decision had been made in the trial court Atchley would not be entitled to relief unless the finding of the California Supreme Court that his statement was voluntary is either disregarded or found erroneous.

Because Atchley was under a sentence of death, his appeal to the California Supreme Court was automatic (Calif. Pen. Code § 1239, subd. [b]). The question he raised was of first impression in our jurisdiction on the procedures to be followed for the introduction of a defendant's "admission" as distinguished from his "confession". The California Supreme Court's opinion in this case clarified the ambiguity arising from some of its earlier opinions by clearly holding that any statement by an accused relative to the offense charged is inadmissible against him if

made involuntarily. *People v. Atchley,* 53 Cal.2d at 170, 346 P.2d at 769.

In reviewing Atchley's claims that his statement was involuntary the California Supreme Court, on direct review, assumed the duty of examining the uncontradicted facts in order to determine *independently* whether the statement was voluntary. *People v. Berve,* 51 Cal.2d 286, 290-91, 332 P.2d 97, 100 (1958). This is the accepted procedure followed by California appellate courts in reviewing contentions that involuntary statements were admitted into evidence. See *People v. Trout,* 54 Cal.2d 576, 583, 6 Cal.Rptr. 759, 763 (1960).[3] This procedure is the same as followed by this Court when the issue is whether or not a coerced confession was admitted. This Court determines "independently whether petitioner's confession was so obtained, by review of the facts upon which that issue necessarily turns". *Chambers v. Florida,* 309 U.S. 227, 228-29 (1940). See also *Lisenba v. California,* 314 U.S. 219, 237 (1941); *Ashcraft v. Tennessee,* 322 U.S. 143, 147-48 (1944); *Malinski v. New York,* 324 U.S. 401, 404 (1945); and *Payne v. Arkansas,* 356 U.S. 560, 562 (1958).

Thus, the scope of appellate review on the issue of whether Atchley's statement was coerced materially differs from the scope of appellate review applied to

[3]In *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 909, 31 Cal.Rptr. 800 (1963), the California Supreme Court discussed the proper role of an appellate court in reviewing a lower court's judgment that a certain book is pornographic. That court concluded that it must make the same "independent examination" of the whole record as it does in confession cases because the constitutionally protected right to free speech is involved. *Zeitlin v. Arnebergh,* 59 Cal.2d at 910 n.12, 31 Cal.Rptr. 805 n.12.

other findings of fact by the trial court.[4] Wherefore, we respectfully submit that the determination of the California Supreme Court on direct review of Atchley's conviction that his confession to Travers was voluntary was a "determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the state . . . were parties, evidenced by a written finding . . .". Hence, it was entitled to the presumption of validity conferred by Title 28, United States Code, section 2254(d). Since there are no findings in the opinion of the district court that there were any infirmities in this determination of the California Supreme Court the writ should have been denied.

The California Supreme Court opinion in *People v. Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959), is unlike that of the Nebraska Supreme Court in *Parker v. State*, 83 N.W.2d 347 (1957), which was recently reviewed by this Court in *Sigler v. Parker*, 396 U.S. 482 (1970). Darrell Parker had been convicted of first degree murder and sentenced to life imprisonment. During the course of his trial numerous confessions were admitted into evidence. In affirming his conviction the Nebraska Supreme Court set forth in its opinion the standards by which the admissibility of those statements were weighed. Those standards were inconsistent with the requirements of *Jackson v.*

[4]With other findings of fact the appellate court must adopt them if they are supported by any evidence in the record. The reviewing court may not draw inferences adverse to the judgment. *People v. Miller*, 71 Cal.2d 459, 78 Cal.Rptr. 449, 457 (1969).

*Denno,* 378 U.S. 368 (1964). Parker, claiming his confessions were improperly admitted, sought post-conviction relief in the state courts. Relief was denied in opinions which merely adopted the original findings of the trial court that the confessions were voluntary. The United States District Court, holding that the trial court's finding that the confessions were voluntary had tainted all subsequent determinations of this issue on direct review and collateral attack, granted a writ of habeas corpus. This Court ordered the matter resubmitted to the state courts so that they could make the initial determination of that issue. *Sigler v. Parker,* 396 U.S. at 484.

In contrast, the California Supreme Court on direct review of Atchley's conviction exercised an independent review of the record on the issue of the voluntariness of Atchley's statement to Travers. The California Supreme Court detailed in its opinion the standards by which this issue was resolved and those standards fully complied with the requirements prescribed by this Court. Hence, in no way can it be said that the trial court's determination tainted the California Supreme Court's finding reached after an independent review of the record.

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## III

### THE TAPE RECORDING OF ATCHLEY'S CONVERSATION WITH TRAVERS WAS PROPERLY INTRODUCED

Relying on *Katz v. United States,* 389 U.S. 347 (1967), Atchley contends that because his statement

with Travers was recorded without his knowledge it must be held to be involuntary as a matter of law. Since Atchley knew that Travers was not going to hold this conversation in confidence.[5] *Katz v. United States, supra,* is of course inapplicable. Moreover, this Court has limited the rule of *Katz v. United States,* 389 U.S. 347 (1967), to prospective application. *Desist v. United States,* 394 U.S. 244, 246 (1968).

In any event, *Katz v. United States, supra,* did not render inadmissible recordings of conversations between two persons made with the consent of one of the parties. In *United States v. Kaufer,* 406 F.2d 550 (2nd Cir. 1969), an Internal Revenue Service agent with the consent of one party listened in on the defendant's telephone conversation. Later, another Internal Revenue Service agent recorded his conversation with the defendant by means of a device concealed in an attache case. The agent testified and the recordings were presented in evidence. The court held that since the recordings were made with the consent of one of the parties they were admissible. This Court granted certiorari and affirmed in a per curiam opinion. *Kaufer v. United States,* 394 U.S. 458 (1969).

Since Atchley was aware that his statements to Travers were to be communicated to others the fact that it was recorded without his knowledge would not render it inadmissible. Compare, *Hoffa v. United*

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[5]Mr. Mulkey [District Attorney]: "You in fact indicated to him that this would have to be reported to your company as far as whatever information he gave you, did you not?

Travers: Yes, absolutely.

Q. So he understood that when he was talking to you?

A. Oh, yes." (App. 142-143.)

*States,* 385 U.S. 293, 300-03 (1966); *Lopez v. United States,* 373 U.S. 427, 438 (1963).

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## IV

**THE WRIT OF HABEAS CORPUS SHOULD BE DENIED WHERE THE STATE HAS AFFORDED ADEQUATE CORRECTIVE PROCESS.**

Atchley misconstrues our request for reform of federal habeas corpus as a call for abolition of the writ. We do not ask this Court to abolish federal review of state court conviction on habeas corpus. Only Congress could do that. What we do ask, and most urgently, is that federal review be redirected so that a criminal conviction may be afforded finality where it appears from the opinion of a state appellate court that the prisoner has been afforded a fair hearing on the issues he sought to raise. Whether this be done by interpretating section 2254(d) to include state appellate court opinions, or by the exercise of this Court's rule making power, as was done in *Brown v. Allen,* 344 U.S. 443 (1953), *Townsend v. Sain,* 372 U.S. 293 (1963) and *Fay v. Noia,* 372 U.S. 391 (1963), is of little moment. As pointed out in the Opening Brief, the need for reform is compelling and the opportunity for reform is present in this case.

From the face of the California Supreme Court opinion, it is apparent that Atchley received a thorough hearing and independent review of his claim that his confession was involuntary. It is also apparent that the state courts correctly resolved the question.

Atchley has at no time even suggested that the California appellate process denied him fairness. Thus, the District Court should have accepted the California Supreme Court resolution of his claim and denied the writ. Instead, the district court ordered a further hearing in the state court, with the likelihood of further appeals and collateral proceedings if Atchley loses again. The People of the State of California deserve better than this.

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## CONCLUSION

R. K. Procunier, Director of the California Department of Corrections, and petitioner herein, respectfully requests this Court to remand the case to the Ninth Circuit Court of Appeals with directions to reverse the order of the district court granting the writ, and to direct the Court of Appeals to order the district court to deny Atchley's petition for the writ of habeas corpus.

Dated, San Francisco, California,
November 12, 1970.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* ATCHLEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 44. Argued November 18, 1970—Decided January 19, 1971

Respondent was convicted in 1959 of murdering his wife. A recorded statement, made in jail to an insurance agent in connection with discussion of a policy on the life of respondent's wife, was admitted into evidence at the trial. The California Supreme Court affirmed the conviction, finding the statement voluntary. Respondent later sought federal habeas corpus relief, contending that the statement was involuntary. The District Court granted relief on the ground that the trial court had excluded relevant evidence on the issue of voluntariness and thus "did not reliably determine whether [the] confession was voluntary or involuntary." The Court of Appeals affirmed. *Held:* An applicant for federal habeas corpus relief is not entitled to a new hearing on the voluntariness of a statement introduced at his trial merely because he can point to shortcomings in the state court procedure used to decide the voluntariness issue, as he must also show (which respondent did not do in this case) that his version of the events, if true, would require the conclusion that the statement was involuntary. Pp. 5–9.

412 F. 2d 230, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BLACK, J., made a concurring statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1970

R. K. Procunier, Director, California Department of Corrections, Petitioner, *v.* Veron Atchley.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 19, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

In 1959 a jury in a California trial court found the respondent guilty of murdering his wife by firing six bullets into her body at close range. A key prosecution witness at the trial was Ray Travers, an insurance agent. The day after the respondent's wife was killed, Travers visited the respondent in jail at the latter's request, and the two conversed regarding an insurance policy on the life of the decedent. During the course of this conversation the respondent told Travers his version of how his wife had been killed, admitting that he had lain in wait for her with a gun, but insisting that her shooting had been accidental. As he was leaving the jail, Travers told the sheriff's officers about the respondent's statement. They asked him if he would be willing to have his next conversation with the respondent electronically recorded, and, since he planned to return to get additional information for the insurance company, he agreed. Later the same day Travers returned to the jail and had another conversation with the respondent, in the course of which the respondent again gave Travers substantially the same account of the circumstances of his

wife's death. This conversation was recorded.[1] Over the objection of defense counsel, the recording of the second conversation was admitted in evidence at the trial. Travers in detailed testimony verified the authenticity of the recording, and orally recounted the two conversations he had had with the respondent. The accuracy of the recording and of Travers' testimony was not questioned; indeed, when the respondent took the stand he gave substantially the same account of how his wife had been killed that he had given to Travers.

On appeal to the Supreme Court of California, the respondent contended that the second conversation with Travers was an involuntary confession, and that the record of the conversation and Travers' supporting testimony had, therefore, been wrongly admitted in evidence at the trial. The state appellate court unanimously rejected this contention and affirmed the conviction. *People* v. *Atchley*, 53 Cal. 2d 160, 346 P. 2d 764. Proceeding upon the proposition that "any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily," Justice Traynor's opinion for the Supreme Court of California reasoned as follows:

> "Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers be-

[1] No charges had been filed against the respondent at the time of these conversations. Cf. *Massiah* v. *United States*, 377 U. S. 201.

fore ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

"Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra* v. *Denno*, 347 U. S. 556. . . . Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement. . . .

"While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred." 53 Cal. 2d, at 170–171; 346 P. 2d, at 769–770.

This Court granted certiorari.[2] After hearing argument, we disposed of the case as follows:

"After hearing oral argument and fully examining the record, we conclude that the totality of circum-

[2] 362 U. S. 987.

stances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed." [3]

In 1967 the respondent initiated the present habeas corpus proceeding in the United States District Court for the Northern District of California. He contended that decisions of this Court rendered subsequent to his direct appeal had established that the recording of his conversation with Travers had been unconstitutionally introduced into evidence, and that he was accordingly entitled to a new trial. It was asserted that his statements were involuntary under the criteria stated in *Johnson* v. *New Jersey*, 384 U. S. 719, because he had been denied access to a lawyer and because he had not been advised of his right to remain silent; and that in any event the procedures used to determine the voluntariness of these statements were constitutionally inadequate under the criteria stated in *Jackson* v. *Denno*, 378 U. S. 368.

The District Court, although making clear that it was not "presently able to say that the confession was involuntary," nonetheless concluded that the respondent was entitled to relief because the state trial court had "excluded relevant and perhaps crucial evidence on the issue of whether the confession was voluntary" and thus "did not reliably determine whether Atchley's confession was voluntary or involuntary." 300 F. Supp. 68, 71–72. The excluded evidence that the District Court thought "relevant and perhaps crucial" had to do with what the police had said to Travers before the recorded interview, whether the respondent had been trying to obtain a lawyer, whether Travers had deceived the respondent about his motives and feigned sympathy, whether the respondent knew that the conversation was being recorded, and,

[3] 366 U. S. 207.

finally, with the respondent's intellectual and educational qualifications. Because inquiry into these matters had been restricted, the federal court held that the wrong standard of voluntariness had been applied in the state trial proceeding. Accordingly, the District Court ruled that the respondent was entitled to a new hearing in the state courts on the issue of voluntariness and, in the event that the statements should be found involuntary, to a new trial. The Court of Appeals affirmed on the opinion of the District Court, Judge Barnes dissenting,[4] and we granted certiorari.[5]

In *Jackson*, the Court held that to commit the determination of the voluntariness of a confession solely to the same jury that decided guilt was inconsistent with the constitutional requirement that the procedures used to determine voluntariness be reliable. Concern for the reliability of the procedures utilized to decide the voluntariness issue was also reflected in *Townsend* v. *Sain*, 372 U. S. 293, where it was held that a state trial court's resolution of a disputed issue of historical fact could not be dispositive in a later federal habeas corpus proceeding unless the petitioner had had a "full and fair hearing" on that issue in the trial court.[6]

But those decisions did not establish that an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts. Our decisions make clear that he must also show that his version of events, if true, would require the conclusion that his confession was involun-

[4] 412 F. 2d 230.

[5] 397 U. S. 905.

[6] Congress in 1966 amended 28 U. S. C. § 2254, so as substantially to codify most of the habeas corpus criteria set out in *Townsend* v. *Sain*.

tary. Thus in *Townsend* v. *Sain, supra,* we did not reach the question whether a hearing was required until we had determined, as a threshold matter, that the application for habeas corpus alleged facts which, if true, would establish that the petitioner had been deprived of constitutional rights by the use of an involuntary confession. 372 U. S., at 309. We said that "the Federal District Court could not conclude that the state trial judge admitted the confession because he disbelieved the evidence which would show that it was involuntary." *Id.,* at 321. And in *Jackson* v. *Denno, supra,* we did not jump from the premise that the procedures used to determine voluntariness were inadequate, to the conclusion that the petitioner was entitled to a new hearing. Instead, we pointed out:

> "This is not a case where the facts concerning the circumstances surrounding the confession are undisputed and the task is only to judge the voluntariness of the confession based upon clearly established facts and in accordance with proper constitutional standards. Here there are substantial facts in dispute . . . . Whether Jackson is entitled to relief depends upon how these facts are resolved, for if the State is to be believed we cannot say that Jackson's confession was involuntary, whereas if Jackson's version of the facts is accepted the confession was involuntary and inadmissible." 378 U. S., at 391–392.

The reason for this approach is obvious. Unless the result of the habeas corpus proceeding turns on disputed issues of historical fact, a rehearing on the issue of the involuntariness of a defendant's incriminating statement would be an exercise in futility, since the applicant for federal habeas would not be entitled to relief even if his allegations of historical fact should be found to be true.

Yet the District Court in this case quite evidently failed to make the threshold determination that the respondent would be entitled to relief if his allegations were believed. Rather the court, disavowing any present ability to say whether the respondent's statement was involuntary, said only that "the trial court could have more competently determined whether [the respondent's] will was overborne" had the circumstances surrounding the statement been more fully explored.

The respondent's trial took place several years before the decisions of the Court in *Escobedo* v. *Illinois*, 378 U. S. 478, and *Miranda* v. *Arizona*, 384 U. S. 436, and those decisions have not been given retroactive effect. *Johnson* v. *New Jersey*, 384 U. S. 719. The admissibility of the respondent's statement as a constitutional matter was governed, therefore, by the contemporary case law elaborating the due process standard of voluntariness. The question was whether the will of the defendant had been overborne so that the statement was not his free and voluntary act, and that question was to be resolved in light of the totality of the circumstances. See, *e. g.*, *Davis* v. *North Carolina*, 384 U. S. 737; *Haynes* v. *Washington*, 373 U. S. 503, 513–516; *Spano* v. *New York*, 360 U. S. 315, 323; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 147–148.

There is no reason to infer that the Supreme Court of California did not apply the correct constitutional criteria in reviewing the issue, and the court quite clearly assumed the truth of the respondent's version of the historical facts still in dispute, in holding that his statement was not involuntary.

The respondent contended that his confession was involuntary because he had been denied a lawyer, because he had not been advised of his right to remain silent, because he had thought he was giving Travers information that Travers needed to obtain the insurance

money, because he had thought that what he told Travers would be held in confidence, because he had not known that his conversation with Travers was being recorded, and because he was lower than average in intelligence and educational attainments. Of these six assertedly coercive factors, three went only to the weight to be given other evidence of actual coercion. Low intelligence, denial of the right to counsel, and failure to advise of the right to remain silent were not in themselves coercive. Rather they were relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. See *Darwin* v. *Connecticut*, 391 U. S. 346; *Greenwald* v. *Wisconsin*, 390 U. S. 519; *Davis* v. *North Carolina, supra*. The circumstance that the conversation was recorded without the respondent's knowledge did not tend to show either actual coercion or a potentially coercive setting. The factual issue whether the respondent thought his statements to Travers would be held in confidence was resolved in the trial court. Travers testified that he advised the respondent that what he said would have to be reported to the insurance company and that the respondent knew it would be a matter of record. This testimony was not contradicted, and there was no reason for the California Supreme Court to disturb the finding, implicit in the trial record, that the respondent had had no reason to believe that Travers would not repeat what he had been told. See *Townsend* v. *Sain*, 372 U. S. 293, 314. The remaining contention was that the respondent's statement was improperly induced by the suggestion that Travers needed the information in order to obtain insurance money for Atchley's children and stepchildren. The California Supreme Court properly found that "the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking

questions and not as an inducement to any particular answers."

It is clear that the California courts gave full consideration to the issue of the voluntariness of the respondent's statement, and that they applied correct standards of constitutional law in upholding its admission in evidence. Accordingly, the District Court was in error in requiring a new trial of claims that were long ago fully, fairly, and correctly determined in the courts of California.

*The judgment is reversed.*

MR. JUSTICE BLACK concurs in the judgment and substantially all of the opinion.